Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

JOHN DOE; JANE DOE

Petitioners,

v.

GEORGE LOCKWOOD;
CITY OF NILES;
RICHARD DIXON;
RICHARD WILSON;
CHRIS MANNELLA;
BRUCE BENNETT;
WARREN CITY BOARD OF HEALTH

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the constitutionally protected interest in preventing the unwarranted disclosure of personal information is violated by public dissemination of an individual's HIV/AIDS status?

2. Whether in reviewing a Rule 12(b)(6) Motion to Dismiss, a Court may ignore the factual assertions in a Complaint, and assume different facts in order to find a wavier of constitutionally protected privacy interests?

3. Whether a public official can invoke the defense of qualified immunity in the face of clearly established statutory and constitutional rights, of which a reasonable person would have known, which prohibit the conduct complained of?

LIST OF PARTIES

All parties to the proceeding are identified in the caption.

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Petitioners, John Doe and Jane Doe, petition for a Writ of Certiorari to review both the June 27, 1996 Opinion of the United States Court of Appeals for the Sixth Circuit and the Rule 12(b)(6) dismissal by Judgment Entry, Memorandum Opinion and Order entered by the United States District Court for the Northern District of Ohio, Eastern Division on April 4, 1995 and January 27, 1995, respectfully.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. A, *infra*, pp. 1a-14a) is not published. The Opinion of the United States District of Ohio, Eastern Division (App. C, *infra*, pp. 16a-34a) is not published.

JURISDICTION

This Petition seeks review of the Opinions entered by the United States Court of Appeals for the Sixth Circuit on June 27, 1996, and by the United States District Court for the Northern District of Ohio, Eastern Division on January 27, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS

The constitutional provision involved in this review is the United States Constitution, Amendment XIV, Section 1 which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

> the privileges or immunities of citizens of the *United States; nor shall any State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A federal statute involved in this review is 42 U.S.C. §1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The state statute involved in this review is Ohio Rev. Code §3701.243(C)(1) and (2) which provides:

> (C)(1) Any person or government agency may seek access to or the authority to disclose the HIV test records of an individual in accordance with the following provisions:
>
> (a) The person or government agency shall bring an action in a court of common pleas requesting disclosure of or authority to disclose

the results of a HIV test of a specific individual, who shall be identified in the complaint by a pseudonym but whose name shall be communicated to the court confidentially, pursuant to a court order restricting the use of the name. The court shall provide the individual with notice and an opportunity to participate in the proceedings if he is not named as a party. Proceedings shall be conducted in chambers unless the individual agrees to a hearing in open court.

(b) The court may issue an order granting the plaintiff access to or authority to disclose the test results only if the court finds by clear and convincing evidence that the plaintiff has demonstrated a compelling need for disclosure of the information that cannot be accommodated by other means. In assessing compelling need, the court shall weigh the need for disclosure against the privacy right of the individual tested and against any disservice to the public interest that result from the disclosure, such as discrimination against the individual or the deterrence of others from being tested.

(c) If the court issues an order, it shall guard against unauthorized disclosure by specifying the persons who may have access to the information, the purposes for which the information shall be used, and the prohibitions against future disclosure.

(2) A person or government agency that considers it necessary to disclose the results of

an HIV test of a specific individual in an action in which it is a party may seek authority for the disclosure by filing in camera motion with the court in which the action is being heard. And hearing the motion, the court shall employ procedures for confidentiality similar to those specified in provision (C)(1) of this section. The court shall grant the motion only if it finds by clear and convincing evidence that a compelling need for the disclosure has been demonstrated.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari ("Petition") arises out of an action brought on March 18, 1994, for violation of constitutional and civil rights, as well as other tortious injury. The action was filed in the United States District Court for the Northern District of Ohio, Eastern Division by John Doe and Jane Doe against George Lockwood ("Lockwood"), the City of Niles, Richard Dixon, Richard Wilson, Chris Mannella, Bruce Bennett (collectively the "Niles Defendants") and (by amendment of the Complaint), Warren City Board of Health. The Ohio Department of Health and Rudy Singletary had been defendants, but they were dismissed on jurisdictional and other grounds that were not contested.

Motions to dismiss for failure to state a claim upon which relief can be granted, pursuant to Federal Rule 12(b)(6), were filed by Lockwood and the Niles Defendants. In his Report and Recommendation, the Magistrate Judge denied the motions to dismiss, finding that the First Amended Complaint stated a claim for violation of John Doe's and Jane Doe's constitutional interest in informational privacy against Lockwood and the Niles Defendants who had intentionally

used the local newspapers to advertise John Doe's identity, HIV status and whereabouts. The defendants engaged in this conduct even though they acknowledged that such unwarranted disclosure violated the law.

In response to the Defendants Objections to the Report and Recommendation of Magistrate Judge, the United States District Court for the Northern District of Ohio, Eastern Division, issued its Memorandum, Opinion and Order rejecting the conclusions of the Magistrate Judge that John Doe and Jane Doe had stated a claim under 42 U.S.C. §1983 for violation of their constitutional and civil rights, and dismissed the pendent claims without prejudice. The District Court focused on the Sixth Circuit precedent denying the existence of a protected privacy interest.

Pursuant to leave of Court, John Doe and Jane Doe filed their Second Amended Complaint on February 14, 1995. The District Court filed its Judgment Entry on April 4, 1995, granting the motions to dismiss and *sua sponte* dismissing the Defendant Warren City Board of Health which had failed to enter any appearance in the action.

John Doe and Jane Doe appealed to the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"), which by Opinion dated June 27, 1996, affirmed the decision of the District Court, holding that "the Does have failed to show that John Doe enjoyed a constitutional right to informational privacy in his HIV-positive status under the law as it currently stands..." (App. A, p. 2a). It further held that if any protected interest existed, it was waived when, in an unrelated hearing upon a request for medical leave from a sentence for receiving stolen property, Doe was "forced" by the state court, in violation of state law, to reveal his HIV status. (App. A, p. 11a). The Sixth Circuit went on to conclude that the Complaint

failed to make a "threshold" showing that Doe was given no choice by the State but to reveal this information to the local judge. (App. A, p. 14a).

The Sixth Circuit, in the course of its analysis, failed to consider (1) the basis upon which the District Court had dismissed the Complaint, i.e., that the Sixth Circuit holds that there is no constitutionally protected interest in preventing the unwarranted disclosure of personal information, including the HIV/AIDS status of an individual, and (2) the facts alleged in the Second Amended Complaint that John Doe "without the assistance of counsel, was forced by Judge Townley, an employee of Defendant Niles, to state in open court that his blood disorder was an HIV infection.... This was done by Defendant Niles in total disregard for Plaintiff's constitutional and civil rights, in violation of Ohio law and done despite the fact that the Judge had previously reviewed the AIDS diagnosis from John Doe's private physician." (App. E, pp. 63a-64a). Instead, the Sixth Circuit engaged in a series of factual speculations of which it conceived independently from the allegations in the Second Amended Complaint for the purpose of satisfying itself that if any rights had existed, they were waived.

ARGUMENT

The questions presented in this Petition for Writ of Certiorari are presented in the context of a *de novo* review in which this Court is being asked to determine whether the District Court and the Sixth Circuit properly dismissed John Doe's and Jane Doe's claims for failure to state a claim upon which relief can be granted. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232 (1984). If the dismissal is permitted to stand, then it will be an acknowledgment that virtually every federal court other than the Sixth Circuit has

improperly defended a constitutionally protected privacy interest in avoiding unwarranted disclosure of personal information.

I. THE DISTRICT COURT AND THE SIXTH CIRCUIT FAILED TO RECOGNIZE THE CONSTITUTIONALLY PROTECTED INTEREST IN PREVENTING THE UNWARRANTED DISCLOSURE OF PERSONAL INFORMATION THAT WAS VIOLATED BY PUBLIC DISSEMINATION OF THE PETITIONERS' HIV/AIDS STATUS.

A. Conflict Between Sixth Circuit And Other Federal Courts Demands Clarification Of This Court's Protection For Individual Privacy Interest In Avoiding Disclosure Of Personal Matters.

This Court's recognition of "an individual interest in avoiding disclosure of personal matters" in *Whalen v. Roe*, 429 U.S. 589 (1977), has been nullified by recent decisions of the Sixth Circuit Court of Appeals, including the decision below. The Sixth Circuit's refusal to recognize the privacy interest in protecting personal information from unwarranted disclosure demands an authoritative response from this Court.

Petitioners, John Doe and Jane Doe, urge this Court to clarify and reaffirm the scope of the constitutional privacy interest announced in *Whalen v. Roe*. Subsequent decisions of this Court, including *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), and *U.S. Dept. of Justice v. Reporter's Committee*, 489 U.S. 749 (1989), have reiterated and applied this informational privacy interest.

While the vast majority of federal courts recognize *Whalen* for its formulation of informational privacy, the Sixth Circuit defiantly disregards the plain meaning of *Whalen*. This Court should tolerate neither the Sixth Circuit's cavalier reading of its precedents, nor the Sixth Circuit's singlehanded deviation from uniform federal court protection for informational privacy.

In *Whalen*, this Court considered a challenge to a New York statute which sought to record information on patient use of prescription drugs. Examining the asserted privacy rights of patients, this Court identified two constitutional privacy interests: **"One is the individual interest in avoiding disclosure of personal matters,** and another is the interest in making certain kinds of important decisions." 429 U.S. at 599 (emphasis added). The *Whalen* majority grounded the source of these privacy interests "in the Fourteenth Amendment concept of personal liberty." *Whalen*, 429 U.S. at 599, n.23, citing *Roe v. Wade*, 410 U.S. 113, 153.

Foremost of the privacy interests asserted by patients, this Court acknowledged their "genuine concern that the information will become publicly known and that it will adversely affect their reputations." *Whalen*, 429 U.S. at 601. However, in weighing the patients' privacy interests against the state's interest in acquiring the information, this Court upheld the statute. Compelling this Court's decision were the statute's elaborate confidentiality safeguards, which "evidence a proper concern with, and protection of, the individual's interest in privacy." *Id.*, at 606. Absent the requisite confidentiality safeguards, *Whalen* suggested that a statute may violate the individual interest in informational privacy.

While affirming the New York statute, the *Whalen* majority aired its grave concerns for safeguarding the

individual interest in avoiding disclosure of personal matters. First, this Court noted the government's potential to abuse its considerable power to collect personal information. *Whalen*, 429 U.S. at 605. However, *Whalen* outlined substantive limits on the state's power to disseminate private information:

> **The right to collect and use such data is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures** ... [I]n some circumstances **that duty arguably has its roots in the Constitution.**

Id. (emphasis added). The real thrust of this Court's decision in *Whalen* is its concern for the government's unwarranted disclosure, and not its mere collection, of personal information.

Shortly after its decision in *Whalen*, this Court reaffirmed its pronouncement of the individual privacy interest in avoiding disclosure of personal matters. In *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the former President challenged the government's collection of presidential papers and records for archival purposes. Nixon argued that the materials requested implicated his constitutional right to informational privacy.

To foreclose potential ambiguity about the status of the *Whalen* informational privacy interest, this Court declared: **"One element of the right of privacy has been characterized as 'the individual interest in avoiding disclosure of personal matters.'"** *Nixon*, 433 U.S. 425, 457, citing *Whalen*. Acknowledging the right articulated in *Whalen*, this Court noted that "public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in

their public capacity." *Nixon*, 433 U.S. at 458, citing *Whalen v. Roe*.

Having conceded the former President's right to informational privacy, the *Nixon* Court balanced the intrusion against "the public interest in subjecting the Presidential materials...to archival screening." *Id.*

While the *Nixon* Court upheld disclosure of the President's official papers, it expressly exempted his purely private materials. Nixon's records embracing:

> extremely private communications between him and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as a personal diary and his wife's personal files ...

were entitled to protection for informational privacy. *Nixon*, 433 U.S. at 458.

Since the *Nixon* controversy narrowly addressed the scope of disclosure for archival purposes of the Presidential Recordings and Materials Preservation Act, this Court could have addressed only the issue of statutory construction. However, the *Nixon* decision referred to a more expansive concept of privacy, gleaned from the First, Fourth, and Fifth Amendments, as well as the *Whalen* strand of informational privacy. *Nixon*, 433 U.S. at 455-58. Significantly, this Court elected to affirm the former President's constitutional privacy "interest in avoiding disclosure of personal matters."

Most recently, this Court reaffirmed and applied the *Whalen* constitutional privacy interest in avoiding disclosure of personal matters in *U.S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749 (1989). In *Reporters Committee*, this

Court interpreted the Freedom of Information Act's "personal privacy" exemption to prevent disclosure of FBI rap sheet summaries to the media. Noting that the meaning of "personal privacy" within the statute was a distinct inquiry from "whether an individual's interest in privacy is protected by the Constitution," *Reporters Committee*, 489 U.S. at 762, n.13, this Court nonetheless seized the occasion to reaffirm the constitutional privacy interest set forth in *Whalen*:

> **As we have pointed out before, "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters,** and another is the interest in independence in making certain kinds of personal decisions." **Here, the former interest, "in avoiding disclosure of personal matters," is implicated.**

Reporters Committee, 489 U.S. at 762, citing *Whalen*.

Significantly, this Court reiterated the precedental force of *Whalen*: **"We have also recognized the privacy interest in keeping personal facts away from the public eye."** *Id.*, at 770, citing *Whalen*. Citing the seminal article by Warren & Brandeis, this Court credited the common law tradition supporting the right to privacy as the individual's

> right of determining ... to what extent his thoughts, sentiments, and emotions shall be communicated to others ... [E]ven if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them.

Reporters Committee, 489 U.S. at 763, citing Warren & Brandeis, "The Right to Privacy," 4 Harv. L. Rev. at 198 (1890).

Accordingly, this Court upheld the "substantial" privacy interests of the subjects of the FBI summaries against disclosure. While the Reporters argued that the subjects had a diminished expectation in privacy since the information had previously been disclosed to the public, this Court "reject[ed] Respondent's cramped notion of personal privacy." *Reporters*, 489 U.S. at 763. "[T]he fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information." *Id.* at 770, citing Rehnquist, "Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?" Nelson Timothy Stephens Lectures, University of Kansas Law School, pt. 1, p. 13 (1974).

In applying the *Whalen* informational privacy interest to prevent disclosure of the FBI summaries, this Court indicated that constitutional privacy protects a range of "personal information" in addition to medical records. Indeed, this Court clarified the narrow holding of *Whalen*: "In holding only that the Federal Constitution does not **prohibit** such a compilation, we recognized that such a centralized computer file posed a 'threat to privacy.'" *Reporters Committee*, 489 U.S. at 763, citing *Whalen* (emphasis original).

B. Federal Courts' Reliance Upon Whalen And Progeny To Vindicate Individual Interest In Avoiding Disclosure Of Personal Matters.

In reliance on *Whalen v. Roe*, virtually every federal court to hear the issue has invoked the constitutional privacy interest to limit or remedy disclosure of an individual's HIV or

AIDS status. Noting that "[t]here are few areas which more closely intimate facts of a personal nature than one's HIV status," the District Court of Massachusetts recently held that a plaintiff has a constitutional right to privacy which encompasses her HIV status. *Doe v. Town of Plymouth*, 825 F.Supp. 1102, 1107 (D.Mass. 1993).

Given the social stigma associated with the HIV and AIDS phenomenon, courts are especially vigilant in enforcing the individual privacy interest in avoiding disclosures. One court poignantly captured the high stakes of unwarranted and nonconsensual disclosure:

> There are few matters of a more personal nature, and there are few decisions over which a person could have a greater desire to control, than the manner in which he reveals that [AIDS] diagnosis to others. An individual's decision to tell family members as well as the general community that he is suffering from an incurable disease, particularly one such as AIDS, is clearly an emotional and sensitive one fraught with serious implications for the individual.
>
> * * *
>
> The threat to family life and the emotional enrichment from ties with others is quite real when an AIDS victim's diagnosis is revealed. Ignorance and prejudice concerning the disease are widespread; the decision of whether, or how, or when to risk familial and communal opprobrium and even ostracism is one of fundamental importance.

Doe v. Coughlin, 697 F.Supp. 1234, 1237, 1239 (N.D.N.Y. 1988)(citation omitted). Thus, *Coughlin* and the other federal court decisions acknowledge the individual's interest in controlling disclosure and dissemination of their HIV and AIDS status.

Among the courts which have affirmed the *Whalen* privacy interest as applied to sensitive medical information are the following: *Doe v. City of New York*, 15 F.3d 264, 269 (2nd Cir. 1994) (recognizing *Whalen* and *Nixon* as creating constitutionally protected interest in avoiding disclosure of personal matters including one's HIV status); *Doe v. Attorney General of the United States*, 941 F.2d 780, 795-96 (9th Cir. 1991) (recognizing *Whalen* as declaring constitutional protection for individual interest in avoiding disclosure of personal matters, specifically HIV or AIDS diagnosis); *Harris v. Thigpen*, 941 F.2d 1495, 1513 (11th Cir. 1991) (assuming a constitutionally protected privacy interest in avoiding disclosure of HIV information); *Woods v. White*, 689 F.Supp. 874 (W.D. Wis. 1988), *aff'd.*, 899 F.2d 17 (7th Cir. 1990) (inmates had privacy interest in avoiding disclosure of HIV status); *Doe v. Plymouth*, 825 F.Supp. 1102, 1107-08 (Mass. 1993) (police disclosure of plaintiff's HIV status supported 1983 action against police for violation of constitutional privacy interest); *Faison v. Parker*, 823 F.Supp. 1198, 1201-05 (E.D. Pa. 1993) (acknowledging constitutionally protected privacy interest in avoiding disclosure of HIV status); *Nolley v. County of Erie*, 776 F.Supp. 715, 728-33 (W.D.N.Y. 1991) (Constitution protected plaintiff's interest in avoiding disclosure of her HIV status to fellow inmates); *Arnold v. American Red Cross*, 93 Ohio App.3d 564, 576, 639 N.E.2d 484 (1994) (acknowledging constitutionally protected interest in avoiding disclosure of personal information, to protect confidentiality of donor of HIV-tainted blood); *Hillman v. Columbia County*, 164 Wis.2d 376, 474 N.W.2d 913 (Wis. App. 1991) (inmate stated

1983 claim for breach of informational privacy against jail employees who disclosed HIV status).

In effect, *Whalen* inspired an entire body of constitutional information privacy law. Federal courts have relied upon *Whalen* to recognize an individual's interest in avoiding disclosure of personal matters, and to remedy the government's unwarranted disclosure of such information.

"Prudential and pragmatic considerations" militate strongly in favor of reaffirming the precedental value of *Whalen v. Roe*. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, (1992). Since so many federal and state courts have relied upon this Court's expression of an informational privacy interest, that interest is clearly workable and relevant today. Developments in the law and in society militate in favor of reaffirming *Whalen*.

Petitioners respectfully urge this Court to affirm the correctness of the federal and state courts' reliance upon *Whalen* to protect the individual interest in avoiding disclosure of personal matters, including sensitive medical information such as one's HIV or AIDS status.

C. Sixth Circuit Disregards Clear Meaning Of Whalen.

While the vast majority of federal courts have enforced the informational privacy interest announced in *Whalen*, the Sixth Circuit Court of Appeals stands alone in its staunch refusal to recognize this privacy interest.

The District Court's dismissal of John Doe's and Jane Doe's Complaint was inspired by the Sixth Circuit's hostility to *Whalen's* formulation of informational privacy. This is evident from the District Court's Opinion (App. B) and the

plain text of the Sixth Circuit's recent decisions involving nonconsensual disclosure of an individual's HIV or AIDS status, including the decision below.

While John Doe's appeal to the Sixth Circuit clearly implicated the *Whalen* informational privacy interest, the Sixth Circuit made only a fleeting reference *to Whalen*, mandatory precedent by this Court, in a footnote. Affirming the District Court's dismissal of Doe's complaint for failure to state a claim, the Sixth Circuit declared, incredulously: "Does have failed to show that John Doe enjoyed a constitutional right to informational privacy under the law as it currently stands." (App. A, p. 2a, emphasis added). As a final insult to the right advanced by the Does, the Sixth Circuit disingenuously disregarded John Doe's unequivocal allegations that he was "forced, without assistance of counsel, to reveal his HIV status in open court as a condition of obtaining medical leave."

Recent decisions of the Sixth Circuit, including the decision below, disavow this Court's recognition of an individual interest in avoiding disclosure of personal matters. In affirming Judge Dowd's Order dismissing the Does' Complaint for failure to state a claim, the Sixth Circuit confirmed it was "because we agree with the District Court that the Does have not asserted a violation of their right to privacy under the law as it currently stands." (App. A, p. 2a, emphasis added). The Sixth Circuit's rejection of the informational privacy interest in the present case and in other recent decisions involving nonconsensual disclosure of one's HIV or AIDS status contravenes the clear import of *Whalen*.

In *Doe v. Wigginton*, 1994 U.S. App. LEXIS 7816 (6th Cir.), the Sixth Circuit rejected an inmate's claim for violation of informational privacy. The inmate's HIV status was revealed to a prison employee who coordinated Doe's transfer

to the facility. *Wigginton*, p. 3. While observing that "'isolated statements' in *Whalen v. Roe*, *Nixon v. Administrator of General Services*, when read out of context, lent some support to...[Doe's] claim," the Sixth Circuit concluded that "the Constitution does not encompass a general right to the nondisclosure of private information." *Wigginton*, p. 5; citing *J.P. v. DeSanti*, 653 F.2d 1080, 1089-90 (6th Cir. 1981). The Sixth Circuit further chided that "inferring very broad 'constitutional' rights where the Constitution itself does not express them is an activity inappropriate to the judiciary." *Wigginton*, p. 5, citing *DeSanti*, 653 F.2d at 1090.

Most recently, in *Jarvis v. Wellman*, 1995 WL 234984 (6th Cir.), the Sixth Circuit restated its hostility to *Whalen's* informational privacy interest in a case involving disclosure of sensitive medical records. Citing to its decisions in *Wigginton* and *DeSanti*, the Sixth Circuit summarily rejected the plaintiff's informational privacy claim:

> Only when "fundamental" rights are implicated does a privacy concern take on constitutional dimensions. Disclosures of plaintiff's medical records does not rise to the level of a breach of a right recognized as "fundamental" under the Constitution.

Jarvis, p. 2.

The Sixth Circuit's decision below, as well as *Wigginton* and *Jarvis*, disregard *Whalen's* express recognition and protection of the individual's interest in informational privacy. The Sixth Circuit stands alone in its refusal to acknowledge and enforce *Whalen's* interest in avoiding disclosure. To correct the Sixth Circuit's pronouncement that "the Constitution does not encompass a general right to

nondisclosure of private information," this Court must show that its recognition of informational privacy is more than an "isolated statement." Accordingly this Court should grant the Petition for Writ of Certiorari and provide the Does a remedy for the Defendants' unwarranted disclosure and dissemination of their HIV information.

II. THE SIXTH CIRCUIT BREACHED A BASIC TENANT OF CONSTITUTIONAL LAW BY INAPPROPRIATELY IMPLYING THE WAIVER OF CONSTITUTIONALLY PROTECTED PRIVACY INTERESTS WHEN IT IGNORED THE FACTUAL ASSERTIONS IN A COMPLAINT, AND GRANTED A MOTION TO DISMISS BASED UPON ASSUMED FACTS AND SCENARIOS NOT CONTAINED IN THE COMPLAINT.

When the District Court reviewed the Respondents' respective Motions to Dismiss, it assumed the facts contained in the Petitioners' Complaint as true, but held that the Sixth Circuit did not recognize any constitutionally protected interest in preventing the unwarranted disclosure of personal information. (App. C, p. 28a). By contrast, the Sixth Circuit both discarded and manipulated the facts contained in the Second Amended Complaint in order to find that John Doe had waived any right he may have had in the privacy of his personal information relating to his HIV/AIDS status.

The Sixth Circuit, while acknowledging the inconsistency in its own cases on the treatment of this asserted

privacy interest[1], presumably grasped upon waiver so that it would not be forced to confront its departure from the precedents in the remaining federal circuits on the existence of this constitutionally protected interest.

In reviewing a lower court's rulings on motions to dismiss, the claimant's allegations must be accepted as true. "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon, infra*, 467 U.S. at 73, 104 S.Ct. at 232. Since the ruling on a motion to dismiss is made as a matter of law, that ruling is examined on a *de novo* basis by the reviewing court. *Abramson v. Brownstein*, 897 F.2d 389, 391 (9th Cir. 1990); *Lister v. Stark*, 890 F.2d 941 (7th Cir. 1989); *National Commodity & Barter Ass'n v. Gibbs*, 886 F.2d 1240 (10th Cir. 1989).

The Sixth Circuit purported to focus its analysis of waiver on the allegations contained in paragraph 25 of the Second Amended Complaint (App. E, p. 63a). The **allegations** state that:

> without the assistance of counsel, [John Doe] was forced by Judge Townley, an employee of Defendant Niles, to state in open court that his blood disorder was an HIV infection. See A-9. This was done by Defendant Niles in total disregard for Plaintiff's constitutional and civil

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[1]In footnote 4 of the Sixth Circuit's Opinion, the Court expressly acknowledged that it did not know whether its recent decisions denying the existence of a constitutionally protected privacy interest in medical records could be reconciled with its earlier decisions which expressly recognized a constitutionally protected interest in the confidentiality of medical records. (See App. A, p. 10a).

> rights, in violation of Ohio law and done despite the fact that the Judge had previously reviewed the AIDS diagnosis from John Doe's private physician.

The Sixth Circuit then focused its analysis on cases that discuss how private information, revealed in a courtroom, is no longer "private".[2] The Sixth Circuit's analysis is flawed, however, since it failed to examine the allegations with an eye towards whether the disclosure to Judge Townley was "voluntary, knowing and intelligent".

This Court has held that a waiver of constitutional rights must be voluntary, knowing and intelligent in order to be enforceable, and has applied this standard in both criminal and civil contexts. *Bradley v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468 (1970); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187, 92 S.Ct. 775, 783 (1972); *Davies v. Grossmont*

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[2]The Sixth Circuit misplaces reliance upon *Doe v. City of New York*, 15 F.3d 264 (2d Cir. 1994). Although the court in *City of New York* acknowledged that a constitutionally protected privacy interest does not exist in matters of public record, it specifically held in that case that there was no waiver of *Doe's* constitutionally protected privacy interest in his HIV information since the information became public, not as a matter of statute through entering into an agreement with an administrative body, but because the administrative body failed in its duty to protect the information, disregarded *Doe's* constitutional rights, and made the information public through a conciliation agreement. *Id.* at 269. *City of New York* actually supports the Petitioners' position, since the allegations in the Second Amended Complaint clearly state that John Doe was forced to reveal his HIV infection in violation of state and federal law. Defendant City of Niles, acting through Judge Townley, breached its absolute mandate of treating John Doe's HIV information confidentially by ignoring and failing in his duty to follow the express procedures set forth in Ohio Revised Code §3701.243(C).

Union High School Dist., 930 F.2d 1390, 1394-95 (9th Cir.), *cert. denied*, 501 U.S. 1252, 111 S.Ct. 2892 (1991).

In determining whether a waiver has been voluntary, knowing and intelligent, courts take into consideration the totality of circumstances and the facts surrounding the particular case. In *Town of Newton v. Rumery*, 480 U.S. 386, 107 S.Ct. 1187 (1987), for example, in evaluating whether the petitioner's waiver of his right to sue pursuant to 42 U.S.C. §1983 in exchange for dismissal of criminal charges against him was voluntary, this Court considered the fact that the petitioner was a sophisticated businessman, was not in jail, was represented by an experienced attorney who drafted the agreement, and considered the agreement for three days before signing it. *Rumery*, 480 U.S. at 394, 107 S.Ct. at 1192. By contrast, in the present case, John Doe appeared before Judge Townley requesting medical leave without assistance of counsel, and was "forced" in violation of federal and Ohio law to state the existence of his HIV infection, even though the Judge was already aware of those facts.

This was a malicious derogation of John Doe's constitutional rights, just as the later disclosures by Respondents. There are no facts alleged in the Second Amended Complaint which could lead one to conclude that, in responding to Judge Townley, John Doe knew that he would be waiving his constitutionally protected privacy interest in his medical information. For the waiver of a constitutional right to be voluntary, knowing and intelligent, the act of waiver must be shown to have been done with awareness of its consequences. *Bradley, supra*, 397 U.S. at 748, 90 S.Ct. at 1468-69. Nothing contained in the Second Amended Complaint could lead one to reasonably conclude that John Doe was aware of the consequences of his answering Judge

Townley's question in order to obtain his medical leave for treatment.[3]

By contrast, the Sixth Circuit embarks upon the assumption and conjecture of a series of facts[4] including whether Doe could have received medical treatment through the state correction's authority (App. A, p. 13a), whether the hearing before Judge Townley was the only method by which he could secure medical leave (App. A, p. 13a), whether Doe might have submitted an affidavit with his medical records under seal (App. A, p. 13a), and whether Doe could have or did request a hearing *in camera* (App. A, pp. 13a-14a).

Rather than "indulge every reasonable presumption against waiver", *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938), the Sixth Circuit engaged every possible assumption in favor of waiver. In so doing, the Sixth Circuit failed to accept as true the allegations contained in the Second Amended Complaint. Further, it glossed over and ignored all acceptable tenants of constitutional law while invalidating the Petitioners' constitutional rights. Petitioners request that their Petition be granted to enable this Court to ensure an appropriate

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[3]Petitioners' position is bolstered by this Court's analysis in *Reporters Committee* wherein this Court rejected the "cramped notion of personal privacy" (489 U.S. at 763) that the subjects of the FBI rap sheets had no privacy interest simply because the information had previously been disclosed to the public. Rather, this Court stated that "even if he has chosen to give [his thoughts, sentiments and emotions] expression, he generally retains the power to fix the limits of the publicity which shall be given them." *Id.* at 763, n. 15.

[4]It is also significant that the Sixth Circuit ignores the allegations contained in ¶26 of the Second Amended Complaint that Defendant Bennett, prior to the medical leave hearing, illegally showed a female friend of John Doe his HIV results. (App. E, p. 64a). No waiver could possibly have applied to that disclosure, yet the Sixth Circuit allowed dismissal of the claims against Bennett.

application of constitutional law and the Federal Rules of Civil Procedure in protecting Petitioners' claims based on their interest in preventing the unwarranted disclosure of personal information.

III. THE DISTRICT COURT ERRED IN GRANTING QUALIFIED IMMUNITY TO THE RESPONDENTS' CONDUCT IN THE FACE OF CONTROLLING FEDERAL AND STATE LAW.

Since qualified immunity is a question of law, this Court must review the issue *de novo*. The District Court asserted, in a summary fashion, that "the individual defendants would be entitled to qualified immunity." (App. C, p. 33a).[5] However, the District Court erred in its determination that "any implied constitutional right on behalf of Plaintiffs to the nondisclosure of HIV or AIDS-related information was not clearly established at the relevant time of the conduct..." (App. C, p. 29a). The District Court failed to consider the relevant authorities to determine whether the Plaintiffs' asserted privacy interests were well established.

The defense of qualified immunity does not shield the Respondents from liability under Section 1983. Qualified immunity is not available if the officials' conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To be held liable for deprivation of rights under Section 1983, officials need not have actual notice that their conduct is unlawful; a reasonably competent official will be imputed with knowledge of the relevant law governing his conduct. *Harlow*, 457 U.S. at 819.

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[5]The Sixth Circuit did not address this issue.

In *Anderson v. Creighton,* the United States Supreme Court further clarified the criteria for determining whether an asserted right was clearly established:

> The right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987) (citations omitted).

In deciding whether a right is clearly established and whether the contours of a right are sufficiently clear, a court looks "to decisions of the Supreme Court and from courts within this Circuit." *Williams by Williams v. Ellington*, 936 F.2d 881, 885 (6th Cir. 1991); *accord, Ohio Civil Service Employees Ass'n v. Seiter*, 858 F.2d 1171 (6th Cir. 1988).

The authorities cited in support of Petitioners' constitutional right of informational privacy indicate a clearly established federal right. Precedent by the United States Supreme Court is dispositive. *Whalen* and its progeny, *Nixon* and *Reporters Committee*, declare and reaffirm the constitutional interest in avoiding disclosure of personal matters.

Likewise, the law in the Sixth Circuit, at the time of the alleged conduct, supports the conclusion that the privacy

interest asserted by the Petitioners was clearly established. In *In re Zuniga*, 714 F.2d 632 (6th Cir.), *cert. denied sub. nom, Zuniga v. United States*, 464 U.S. 983, 104 S.Ct. 426 (1983), the Sixth Circuit had assumed the privacy interest of patients in their medical records and balanced that interest against the costs of disclosure. *Zuniga, supra*, 714 F.2d at 642. And in *Gutierrez v. Lynch*, 826 F.2d 1534 (6th Cir. 1987), the Sixth Circuit had proclaimed: **"It is firmly established that individuals have a constitutionally protected right to privacy."** *Gutierrez, supra*, 826 F.2d at 1539 (citing *Whalen*) (emphasis added).

Significantly, the adverse decisions by the Sixth Circuit addressing the disclosure of HIV-AIDS information were rendered **after** the conduct by the Respondents. Therefore, the Sixth Circuit's decisions in *Doe v. Wigginton, supra*, and *Jarvis v. Wellman, supra*, cannot shield the Respondents from liability.

Furthermore, at the time of the unauthorized disclosures by Respondents, the rule of *Doe v. City of Cleveland*, 788 F.Supp. 979 (N.D. Ohio 1991) -- that AIDS information is "fundamental" and is protected by a constitutional right of nondisclosure -- was controlling in the relevant District. The *Cleveland* decision outlined the contours of the privacy interest in HIV-AIDS information, which prevents unwarranted disclosure to third parties, with clarity. Moreover, *Cleveland* was never overruled. Therefore, the Respondents should have known when they made the wrongful disclosures that they were violating the law. Whether or not the Respondents had actual notice of the *Cleveland* decision, knowledge of that case may be imputed.

As set forth above, the overwhelming majority of federal courts to hear the issue have followed *Whalen* to determine that medical information is protected by the interest in avoiding disclosure of personal matters. According to one of the earliest federal decisions upholding a right to privacy in

HIV information: "[I]t would have been clear to a competent public official in 1986 that individuals have a constitutional right to privacy in information relating to AIDS." *Woods v. White*, 689 F.Supp. 874, 877 (W.D.Wis. 1988) (rejecting the defense of qualified immunity for disclosure of HIV information), *aff'd*, 899 F.2d 17 (7th Cir. 1990). These federal cases from other circuits are persuasive since they "point unmistakably to the unconstitutionality of the conduct complained of" and are "clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." *Ohio Civil Service Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988).

Since precedent by the United States Supreme Court, the Sixth Circuit, the Northern District of Ohio and other federal courts overwhelmingly affirmed the constitutional privacy interest in personal information at the time of the alleged conduct, the Respondents are not entitled to qualified immunity.

In addition, the state statute which specifically protects the confidentiality of HIV/AIDS information, Ohio Revised Code §3701.243(C), should also have put the Respondents on notice that their disclosures of this information were wrongful. In particular, Lockwood admitted to a local newspaper that he was aware of the state confidentiality laws but was trying to circumvent the law. (App. C, pp. 64a-65a and original appendix 2 to Complaint). Since Lockwood was aware of at least the statutory protections for HIV/AIDS information, he may not seek the mantle of qualified immunity in his defense.

Moreover, to assert the defense of qualified immunity, the act which allegedly caused the rights violation must be

within the discretionary functions of the public official. None of the disclosures by the various Respondents fall within their discretionary functions. In particular, the actions of Lockwood in leading a vigilante effort to "corral" John Doe, and in instigating a media campaign to expose John Doe's name "on a billboard" are in direct violation of the public health mandates embodied in state law. (App. C, pp. 64a-65a). "Casual, unjustified dissemination of confidential medical information to non-medical staff and other[s] ... can scarcely be said to belong to the sphere of defendants' discretionary functions." *Woods v. White, supra*, 689 F.Supp. at 877.

Significantly, Lockwood could have achieved his purported public health objectives while maintaining John Doe's rights to privacy by staying within the realm of his discretionary functions. As Deputy Health Director for the Warren City Health District, Lockwood could have utilized the confidential systems of client counseling and partner notification to avert any alleged threat to the public health. Lockwood chose not to follow the confidential counseling and notification protocols established by Ohio law.

Finally, the burden is on the Respondents to offer overriding public policy considerations in support of their claim of qualified immunity. *See Forrester v. White*, 484 U.S. 219, 108 S.Ct 538, 542, 98 L.Ed.2d 555 (1988). The Respondents have not offered any justification for their asserted defense. However, confidentiality of HIV information is a linchpin in the public health strategy to contain the AIDS epidemic. "Rigorous maintenance of confidentiality is considered critical to the success of the public health endeavor to prevent the transmission and spread of HIV infection." *Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic*, at 126 (1988). Public health authorities agree that confidentiality of HIV test results

and related information must be assured in order to persuade persons to get tested and seek medical treatment for HIV. In the wake of this deadly epidemic, such public health justifications for confidentiality are most compelling. Since it is unlikely that any justification asserted by Respondents can override these public health imperatives, the defense of qualified immunity is simply not available to the Respondents.

CONCLUSION

For these compelling reasons, which indicate that there is a split in authority between the Sixth Circuit and other federal courts concerning the constitutionally protected interest in preventing the unwarranted disclosure of personal information, and that fundamental error was committed in dismissing Petitioners' Second Amended Complaint, John Doe and Jane Doe request that this Petition for Writ of Certiorari be granted.

Respectfully submitted on this 25th day of September, 1996.

/S/
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APPENDIX

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 95-3499

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DOE; JANE DOE,

Plaintiffs-Appellants,

v.

GEORGE LOCKWOOD; CITY OF NILES; RICHARD DIXON; RICHARD WILSON; CHRIS MANNELLA; BRUCE BENNETT; WARREN CITY BOARD OF HEALTH,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: MARTIN and SILER, Circuit Judges; and HOOD, District Judge.[1]

PER CURIAM. Arguing that the defendants violated their substantive due process right to the privacy of information concerning John Doe's status as an HIV-infected person by disclosing to the public that John Doe was infected, John Doe and Jane Doe appeal the district court's dismissal of their 42 U.S.C. § 1983 causes of action for failure to state a claim, as well as its dismissal without prejudice of their supplemental state law claims. Because we agree with the district court that the Does[1] have failed to show that John Doe enjoyed a constitutional right to informational privacy in his HIV-positive status under the law as it currently stands, we AFFIRM.

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[1]The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

[1]Jane Doe does not allege that the defendants violated any of her federal constitutional or statutory rights. She claims that John Doe's "privacy right extends not only to an individual [John Doe], but also to those intimately associated with him, such as family members. Therefore, both John Doe and Jane Doe, his finance [sic], may assert their constitutional rights to privacy under 42 U.S.C. Section 1983." *Second Amended Complaint.* For purposes of reaching a decision we will assume, without deciding, that Jane Doe has standing to assert a claim for her injuries based on the alleged violation of John Doe's asserted right to informational privacy.

Based on the Does' first amended complaint[2] and the exhibits of record, the magistrate summarized the facts as follows:

> Plaintiffs John and Jane Doe describe themselves as having been involved in a "committed relationship" with one another and as having made plans to be married.
>
> In August of 1993, while they were living together at a residence in the Niles/Warren area, they were visited by Mr. Ray Singletary, an HIV test counselor for the Ohio Department of Health, at which time he informed the couple that they had been identified as having been exposed to the HIV virus. At the request of Mr. Singletary, the couple underwent testing to determine whether they had been infected with the HIV virus. They tested positive.
>
> During post-test counseling with Mr. Singletary the couple provided him with names of other sexual partners, so that they could also be informed of their exposure to the virus. Mr. Singletary continued to remain in contact with the couple.

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[2]The magistrate issued his Report and Recommendation on October 27, 1994. On February 14, 1995, the Does filed a Second Amended Complaint, deleting defendant Singletary from the 1983 Count brought against individuals. In their Section 1983 Count against municipal defendants, the Does deleted the City of Warren, and inserted the independent Warren City Board of Health as a municipal defendant in the Second Amended Complaint

Subsequent thereto, Mr. Singletary discussed with Mr. George Lockwood, Deputy Health Commissioner for the City of Warren, the HIV/AIDS status of John and Jane Doe. He also described to Mr. Lockwood an alleged threat by John Doe that he intended to "infect unknowing female sexual partners."

In September of 1993 John Doe, who had been convicted of receiving stolen property, was incarcerated serving a six-month sentence, during which time he was granted permission to visit (with accompanying police escort, Officer Durst of the Niles Police Department) his private physician for a second HIV test to confirm the prior positive test results. While in the presence of the police escort John Doe's private physician confirmed the prior results and diagnosed him as having AIDS.

During John Doe's incarceration Mr. Bruce Bennett, municipal prosecutor for the City of Niles, showed a female visitor a file containing John Doe's HIV test results.

John Doe continued to suffer health problems and, as a consequence, he requested from the sentencing court in Niles...medical leave in order to receive treatment. As a condition to securing such leave he was required by the judge to admit his HIV status in open court.

In early December of 1993 articles began to appear in local newspapers...which described the frustration of Mr. Lockwood with a person who

had been diagnosed as having AIDS and who had allegedly threatened to knowingly infect as many others as possible, but whose identity had to be kept confidential by law. [footnote omitted]. In one article, Mr. Lockwood is quoted as saying that he would "like to put [the man's name] on a billboard]," and that he was 'checking with the state to see if it's possible to breach confidentiality." In another article, Mr. Lockwood is quoted as follows: "I'm trying to do whatever I can, short of losing my job. I'd like to get his name in the paper and on a billboard. Confidentiality can only protect someone so far."

In yet another article, Mr. Lockwood stated that two women had contacted him to inform him that they had engaged in sex with John Doe, and that he had encouraged them to testify against John Doe if their HIV results were positive, even though it was "unclear" whether John Doe knew he was HIV-positive when they had sex with him.

The newspaper articles repeatedly refer to the fact that Mr. Lockwood had contact with the Trumbull County Prosecutor's Office (which has jurisdiction over Niles and Warren) in an attempt to convince that office to investigate and criminally charge John Doe in connection with alleged attempts to knowingly infect others with the HIV virus. In fact, in one article Mr. Thomas Gysegem, Assistant Trumbull County Prosecutor, was quoted as stating that his office would work with the law departments of the

Cities of Niles and Warren, as well as the Warren Health Department, to accomplish that goal. Detective Richard Dixon of the Niles Police Department was repeatedly quoted in newspaper articles as stating that the allegations of intent of knowingly infect others were "rumors," but that if they were true then John Doe could be criminally liable. No charges were ever filed in that regard.

Newspaper articles up to this point had revealed many details bearing upon John Doe's identity, including his age, area of residence, description of family members, personal relationships and social habits, without naming him.

On December 7, 1993, Officers Richard Wilson and Chris Mannella of the Niles Police Department were dispatched to the scene of a domestic dispute between a man and a woman, neither of whom were related to, or in the presence of, the plaintiffs. Consequent thereto, the officers completed a police report in which the following appeared:

> ACTION TAKEN Spoke with a Spencer Moss who was upset because his girlfriend, Pam O'Brien had past sexual relationships with the subject, [included here was John Doe's real name], the subject of the current aids controversy (sic).

On the following day, December 8, 1993, the plaintiff was identified in an article appearing in the Tribune Chronicle bearing the headline "AIDS carrier identified; Niles man refuses comment." In fact the first words in the article were John Doe's first and last names, and his name appeared numerous times throughout the article.

Four days later, on December 12th, an editorial bearing the headline "Lockwood manipulated area media" appeared in the Tribune Chronicle. The editorial referred to Mr. Lockwood's attempts to have John Doe publicly identified and, theretofore, to "circumvent a law designed to protect the privacy of people with AIDS", by "pander[ing] to and incit[ing] public fear." The author also wrote:

> In the meantime, officials were making it easy for us to find out the man's identity. Purposely dropped clues led us to jail records and other evidence. A police officer even mentioned the man's name in a police report on a completely separate incident.

The plaintiffs allege that the public identification of John Doe as being involved in what was referred to locally as the "AIDS controversy," caused their lives to be drastically altered in the following ways: (1) Jane Doe's former husband has won custody of her children after "an ex

parte [emergency custody] proceeding where Jane Doe had no opportunity to respond to the charges," which charges included the fact that John Doe had been diagnosed as having AIDS; (2) John Doe attempted suicide; (3) both plaintiffs have "become anxious, despondent, depressed, and frightened;" (4) John Doe has received death threats; (5) both plaintiffs have been subjected to "public scorn" and, as a consequence, they "feel unsafe and fearful when attempting to visit family in the Niles-Warren area;" (6) in an attempt to escape their environment, the plaintiffs have moved away from their "home, friends and family;" and (7) the plaintiffs' already poor health has been negatively affected by the ostracism.

* * * * *

On March 18, 1994, the Does filed this Section 1983 action in federal court, claiming that John Doe's procedural due process rights[3] and substantive due process right to informational privacy had been violated by persons acting under color of state law. The Does also asserted several supplemental state law claims. Motions to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and/or 12(b)(6) were filed at various times by the defendants. The motions were referred to the magistrate. On October 27, 1994, the magistrate recommended that the defendants' various motions for dismissal be denied, reasoning that the Does had alleged a violation of John Doe's asserted constitutional right to informational privacy.

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[3]The Does are not appealing the district court's ruling that their procedural due process rights were not violated.

The magistrate primarily relied on a decision from the Northern District of Ohio, *Doe v. City of Cleveland* in recommending that the defendants' motions to dismiss be denied. The district court in *City of Cleveland* discussed this Court's precedents regarding a claim to a constitutional right to informational privacy, and concluded that:

> While not all information would be protected by the constitution from disclosure, this Court believes that information relating to AIDS--like information relating to psychiatric treatment--is of a fundamental enough nature to be protected. Thus, this Court finds that Doe had a privacy interest in nondisclosure of this private information. Clearly, there was no legitimate governmental interest to be served by disclosure of the information to [a third party].

788 F.Supp. 979, 985 (N.D. Ohio 1991) (discussing *J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981); *In re Zuniga*, 714 F.2d 632 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983); and, *Gutierrez v. Lynch*, 826 F.2d 1534 (6th Cir. 1987)). The magistrate also reasoned that this Court's decision in *Doe v. Wigginton*, 21 F.3d 733 (6th Cir. 1994)--holding that a prison inmate did not have a constitutional right to informational privacy of his HIV-positive status where a corrections officer opened his confidential medical file during his initial processing at a Kentucky penal institution and discovered the information--did not foreclose a holding that John Doe's informational right to privacy was violated. The magistrate believed that neither *Wigginton*, nor *J.P. v. DeSanti* upon which it relied, were on point because in those cases the state actors did not "indiscriminate[ly] disclos[e] [the claimed private information] to private parties who had no legitimate basis for receiving the information." *J.A.* at 85 (magistrate's opinion).

On January 27, 1995, the district court issued an opinion rejecting the magistrate's reading of Circuit precedent and concluded John Doe did not have a constitutional right to informational privacy in his HIV-positive status under *DeSanti* or *Wigginton*.[4] The district court entered judgment for the defendants on April 4, 1995. This timely appeal followed.

Because the district court decided that the defendants had failed to state a claim upon which relief could be granted, we will review the district court's decision as one addressing the merits of Doe's complaint based on the pleadings pursuant to the defendants' 12(b)(6) motions. We have observed that a "district court's dismissal of a civil rights complaint on a 12(b)(6) motion is scrutinized with special care." *Gazette v.*

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[4]Shortly after the district court issued its opinion, this Court decided another case in this line of decisions. *See Jarvis v. Wellman*, 52 F.2d 125, 126 (6th Cir. 1995) (holding that disclosure of plaintiff's medical records to a prison inmate (her assailant) did not rise to the level of a breach of a right recognized as "fundamental" under the federal constitution). It is not clear whether this Court's decisions in *Wigginton* and *Wellman* can be reconciled with our decisions in *General Motors Corp. v Director of Nat. Institute of Occupational Safety and Health*, 636 F.2d 163, 166 (6th Cir. 1980), *cert. denied*, 454 U.S. 877 (1981) (interpreting *Whalen v. Roe*, 429 U.S. 589 (1977) as recognizing that individuals enjoy a constitutionally protected interest in the confidentiality of their medical records) and *In re Zuniga*, 714 F.2d 632, 641 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983) (acknowledging a constitutionally protected privacy interest in the confidentiality of a patient's psychotherapist's files, even if that interest is not absolute. The Court weighed intrusion on the patient's privacy with the grand jury's need for the information in its proceedings).

City of Pontiac, 41 F.3d 1061, 1064 (6th Cir. 1994) (citations omitted). In reviewing whether the Does have alleged any set of facts upon which relief could be granted, we must construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences that might be drawn from the allegations. *Id.* (citing *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976)). Because a 12(b)(6) motion tests the legal sufficiency of the claims asserted, our review is *de novo*. *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 697 (6th Cir. 1996). If the factual allegations in the complaint fail to show that the defendants violated John Doe's right to informational privacy under the Constitution of the United States, then we must affirm the district court's dismissal of their cause of action under 42 U.S.C. § 1983.

In order to sustain their claim that John Doe has a federal constitutional right to informational privacy, the Does must allege facts to show that the information regarding John Doe's HIV status was not already in the public realm. *Doe v. City of New York*, 15 F.3d 264, 268 (2d Cir. 1994) (stating that, "there is no question that an individual cannot expect to have a constitutionally protected privacy interest in matters of public record").

We do not believe that an individual can claim constitutional protection in the privacy of information that he or she has intentionally revealed, without coercion by the state, to the public. More specifically, where an individual reveals private information in a courtroom, the information is no longer either objectively or subjectively "private." *National Polymer Prods., Inc. v. Borg-Warner Corp.*, 641 F.2d 418 (6th Cir. 1981). In *National Polymer Prods.* we observed that it is a

> well-established principle of American jurisprudence that the release of information in open trial is a publication of that information and, if no effort is made to limit its disclosure, operates as a waiver of any rights a party had to restrict its further use. A line of Supreme Court cases emphasizes the importance of public trials to our system of justice and recognizes the right to publish information made a part of the record in a judicial proceeding.

Id. at 421. The same reasoning applies to other judicial proceedings held in a courtroom. As we stated further in *National Polymer Products*, "[w]hat transpires in the courtroom is public property," *id.* at 422 (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)), and "nothing...proscribes the press from reporting events that transpire in the courtroom." *Id.* (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966) (other citations omitted); and *see generally Kiraly v. Federal Bureau of Investigation*, 728 F.2d 273, 280 (6th Cir. 1984) (stating that "[w]hile it is true that [the testifying witness] cannot suppress those facts which have become a matter of public record, she retains her right to privacy as to other personal matters").

Under the facts as stated in the complaint, John Doe cannot claim that state actors who disseminate the same information to the public that he disclosed in open court have violated his asserted federal constitutional right to informational privacy. We believe this is true even if the state actors' source of the private information was not the court proceedings because the information is no longer "private" in the sense that the public is unaware of the information.

After he was sentenced to serve a term of 180-days for receiving stolen property, Doe desired to obtain medical

treatment outside of the penal institution. On September 17, 1992, two days after the court sentenced him, Doe requested medical leave from the court and received a hearing. Doe claims that the court asked him why he wanted treatment and that he was "required" to answer. Doe stated to the court at the hearing that he was HIV positive. Doe's HIV status information appears in a notation in the court's docket sheet. The state court granted his request for treatment. This is the basis for Doe's allegation that he was "forced" by the court to reveal his HIV status.

Whether Doe was forced to reveal this information, or whether he volunteered it, depends upon Doe setting forth facts to show that he had no choice but to reveal this information in open court. First Doe sets forth nothing in his complaint to show that he could not have received medical treatment through the state corrections authority. Doe is not claiming that the only treatment available to him would be treatment he secured for himself outside of the penal institutional. We must infer from the complaint as it stands that State of Ohio did not "force" Doe to request medical leave by giving Doe no other option for receiving medical care. Therefore, nothing in the complaint (or elsewhere in the record), indicates that Doe's request for medical leave was other than a voluntary choice on his part.

Second, Doe does not allege facts to show that a hearing was the only method by which he could have secured his leave. Doe might have requested that the court rule on his motion based on an affidavit from him regarding his condition and based on his medical records showing that he is HIV positive, submitting all under seal.

Third, even if the district court required a hearing on his request, Doe could have told the court that he considered the

requested medical information to be personal and confidential. At this point, the court would have been able to ask Doe to approach the bench and give the court the information, or the court could have held the hearing in camera. Doe does not allege that he notified the court that the information he was about to give the court was of a personal nature.

Doe's HIV-related information entered the public domain at the hearing. Failing to allege facts to show that his revelation of this information to the court was other than voluntary on his part, Doe has not made a threshold showing that he was given no other choice by the state than to reveal this information. If this information was not private information, then, as a matter of logic, the defendants could not have breached any federal constitutional right in informational privacy Doe may formerly had in this information by disseminating to the public information that was already public.

Because we agree that Doe has failed to state a federal claim upon which relief can be granted, we AFFIRM the decision of the district court.

APPENDIX B

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

John Doe, et al.,	)	
	)	CASE NO. 4:94CV0568
Plaintiffs,	)	
	)	
v.	)	
	)	JUDGMENT
George Lockwood,	)	ENTRY
et al.,	)	
	)	
Defendants.	)	

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Plaintiffs have waived their right to a de novo review of the Report and Recommendation of the Magistrate Judge. Accordingly, the motion of defendant Ray Singletary to dismiss for the failure of Plaintiffs to state a claim arising under the Constitution and laws of the United States pursuant to 42 U.S.C. § 1983 is granted. The remaining state claims against Defendant Singletary are dismissed without prejudice. 28 U.S.C. § 1367(c).

IT IS SO ORDERED.

/S/
David D. Dowd, Jr.
U.S. District Judge

APPENDIX C

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

John Doe, et al.,	)	
	)	CASE NO. 4:94CV0568
Plaintiffs,	)	
	)	
v.	)	
	)	MEMORANDUM
George Lockwood,	)	OPINION AND
et al.,	)	ORDER
	)	
Defendants.	)	(Resolving Dockets
	)	42, 47 & 51)

I. INTRODUCTION

Plaintiffs, John and Jane Doe, seek an award of money damages from a series of individual and corporate defendants on the claim that Defendants violated their federal constitutional rights to privacy by deliberating publicizing the fact that John Doe tested positive for being exposed to the Human Immunodeficiency Virus ("HIV") and was later diagnosed as suffering from Acquired Immunodeficiency Syndrome or "AIDS." Defendants claim that the Constitution creates no right which protects the disclosure of John Doe's HIV/AIDS condition; especially as Defendants allege that they believed

John Doe might carry out an alleged threat to intentionally go on a sexual spree and infect uninformed sexual partners.

The Court referred this case to Magistrate-Judge David Perelman for pre-trial supervision. On October 27, 1994, the Magistrate-Judge filed his first Report and Recommendation ("R&R") (Docket No. 42). In sum Magistrate-Judge Perelman recommended that (1) the motion to dismiss filed on behalf of Defendant Ray Singletary, an HIV test counselor for the Ohio Department of Health, be granted based on qualified immunity; (2) the motion filed on behalf of the City of Warren be granted as one for summary judgment because Ohio considers the City of Warren as a distinct legal entity from the Warren City Board of Health; and (3) the motions to dismiss filed on behalf of the defendants City of Niles, Niles police detective Richard Dixon, Niles police officers Richard Wilson and Chris Mannella, and Niles municipal prosecutor Bruce Bennett (the "Niles defendants"), and the motion to dismiss of Defendant George Lockwood, Deputy Health Commissioner for the City of Warren, be denied.

The pivotal conclusion in the Magistrate-Judge's analysis is the view that the plaintiffs enjoy a constitutional right of privacy which prohibits the public disclosure of private facts where, as alleged under the circumstances set forth in the First Amended Complaint, defendants engage in a pattern of conduct that leads to the public disclosure of the fact that the plaintiff is HIV positive and suffers from AIDS.[1]

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[1]Numerous briefs followed. The Niles defendants timely filed their objections to the R&R (Docket No. 43). Defendant Lockwood obtained additional time to file objections (Docket No. 44) and then filed them on November 21, 1994 (Docket No. 46). Next, Plaintiffs moved to file a second amended complaint seeking to join the Warren City

II. THE RIGHT TO PRIVACY OF HIV INFECTED PERSONS

In this case the jurisdiction of the Court is predicated on the proposition that local government officials violate another's constitutional rights by publicizing his or her confidential HIV status or AIDS diagnosis thereby giving rise to a claim under 42 U.S.C. § 1983. Magistrate-Judge Perelman's analytical discussion on this issue leads him to conclude that a clearly established constitutional right of privacy exists in this case which states a claim upon which relief can be granted. The objecting defendants disagree. The R&R leans heavily on the reasoning of Judge Ann Aldrich, a colleague on this Court, who determined that the plaintiff in the case of Doe v. City of Cleveland, 788 F. Supp. 979 (N.D. Ohio 1991) enjoyed such a constitutional right of privacy.

In Doe v. City of Cleveland, officers of the Cleveland Police Department arrested Doe on the allegation of an alleged

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Board of Health as a defendant, but did not file objections to the R&R (Docket No. 47). Plaintiffs also filed a response to the objections of the Niles defendants on November 21, 1994 (Docket No. 48); and filed an additional response to the objections of Defendant Lockwood on November 28, 1994 (Docket No. 49). On December 2, 1994, Defendant Singletary filed an objection to Plaintiffs' motion to file a second amended complaint on grounds that Plaintiffs had not filed an objection to the R&R which recommended that he be dismissed. Plaintiffs, on December 6, 1994, filed a motion to strike the objections of Singletary to Plaintiffs' motion for leave (Docket No. 51). On December 15, 1994, Defendant Singletary replied with an additional memorandum in support opposing any leave for a second amended complaint which would include him as a party defendant (Docket No. 52).

victim that Doe had stabbed him and that Doe was a homosexual and had AIDS. As a consequence, the booking procedures for Doe included a notation on the booking card suggesting that Doe had AIDS. The victim eventually recanted his story and Doe was released, but not before Doe was held for 27 hours without any formal criminal charges having been filed. Subsequently, Doe's employer received an anonymous written notation indicating that Doe had AIDS. Based on that information, Doe was terminated. 768 F.Supp. at 981. Following pre-trial discovery, Doe apparently was able to introduce circumstantial evidence linking the information on the notation to an unauthorized disclosure by the police of the AIDS allegation in its booking files. Cf. Doe v. City of Cleveland, 768 F.Supp. at 981 (referring to the "AIDS-2-10" notation).[2]

In her analysis, Judge Aldrich held that Doe enjoyed a privacy interest protected by the United States Constitution

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[2]Judge Aldrich noted that "[a]t the time of the incident, [plaintiff] did not have AIDS, nor does he now." 788 F.Supp. at 981. The decision did not explore the ramifications of this seemingly crucial fact on Judge Aldrich's right-to-privacy analysis. Although Judge Aldrich did state that "[t]he incident here is the result of one officer's malicious circumvention of Cleveland's policy," id. at 986, her opinion is unclear as to whether the offending officer was merely negligent in accepting the AIDS allegation as true before spreading rumors, or whether the officer's intentional disclosure of untrue facts was simply defamation. Compare Daniels v. Williams, 474 U.S. 327, 336 (1986) (negligent acts by state officials do not give rise to liability pursuant to 42 U.S.C. § 1983); Siegert v. Gilley, 500 U.S. 226, 233 (1991) ("Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation.").

which prevents the disclosure of his HIV/AIDS condition because "information relating to AIDS--like information relating to psychiatric treatment--is a fundamental enough nature to be protected." 768 F.Supp. at 984-85.[3] Judge Aldrich recognized that the Court of Appeals in J.P. v. DeSanti, 653 F.2d 1080 (6th Cir. 1981) had "concluded that the constitution does not encompass a general right to nondisclosure of private information,"[4] but nevertheless determined that information

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[3]The Circuits are split on whether information regarding psychotherapist treatment is even fundamental enough to receive protection under Federal Rule of Evidence 501. See In re Doe, 964 F.2d 1325, 1328 (2d Cir. 1992) (collecting cases). If all courts do not accept such an interest as protected by an open-ended privilege statute based on "reason and experience," then there certainly is significant doubt whether such an interest is so "fundamental" as to be protected by the Constitution.

[4]Compare also McNally v. Pulitzer Publishing Co., 532 F.2d 69, 76-77 (8th Cir.) ("The constitutional right of privacy is not to be equated with the common law right recognized by state tort law. . . .[T]he federal courts have generally rejected efforts by plaintiffs to constitutionalize tortious invasions of privacy involving less than the most intimate aspects of human affairs.") (citations omitted), cert. denied, 429 U.S. 855 (1976) with Scheetz v. Morning Call, Inc., 747 F.Supp. 1515, 1521-22 (E.D.Pa. 1990) (collecting cases for the proposition that an individual's interests in personal information in the control of the state are protected from disclosure by an implied constitutional right to privacy), aff'd, 946 F.2d 202 (3d Cir. 1991), cert. denied, 112 S.Ct. 1171 (1992).

relating to AIDS was an exception to that general rule. See Doe v. City of Cleveland, 788 F.Supp. at 984.[5]

In finding a constitutional right of privacy in the nondisclosure of AIDS-related information, Judge Aldrich relied on the decisions of In re Zuniga, 714 F.2d 632 (6th Cir.), cert. denied, 464 U.S. 983 (1983) and Gutierrez v. Lynch, 826 F.2d 1534, 1538 (6th Cir. 1987); and on the recent decision of Doe v. Borough of Barrington, 729 F.Supp. 376 (D.N.J. 1990).

The Court of Appeals in Zuniga primarily addressed the nature of the psychotherapist-patient privilege under Federal Rule of Evidence 501, but assumed for the sake of argument that the Constitution protected any right to privacy which attaches to the psychiatrist-patient relationship in order to dispose of any claims on that basis. 714 F.2d at 641. The Zuniga Court denied the defendants' challenges to the district court's contempt orders reasoning that the state's slight intrusion on the patients' privacy interest when weighed against the need for the grand jury to conduct an effective and comprehensive investigation into alleged violations of law, did not unconstitutionally infringe on any right of defendants' patients in their otherwise confidential identities. See Zuniga, 714 F.2d at 642. Thus, although the Zuniga court balanced the

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[5]Despite Judge Aldrich's recognition of a constitutional right to the nondisclosure of AIDS-related information, the plaintiff's action in Doe v. City of Cleveland did not survive summary judgment. Plaintiff had filed his privacy claims against the individual defendants in their official capacities only, and was unable to establish an unconstitutional policy, practice, or failure to train on behalf of the City. 768 F.Supp. at 983 & 986. As a result, the Court granted the motion of all the defendants, including the City of Cleveland, for summary judgment. 768 F.Supp. at 986.

state's versus the individual's privacy interests in reaching its arguendo decision, it in no way detracted from the DeSanti holding which refused to recognize general constitutional rights to nondisclosure of private information. See Zuniga, 714 F.2d at 641 n. 9 (recognizing DeSanti).

The Sixth Circuit's decision in Gutierrez likewise provides little support for a distinction of the general DeSanti rule. The Court in Gutierrez described two types of privacy interests recognized by the Constitution: (1) "the right to avoid disclosing matters of a personal nature;" and (2) "the right to independence in making certain types of important personal decisions." 826 F.2d at 1539 (citing Whalen v. Roe, 429 U.S. 589, 599-600 (1977)). Judge Aldrich in Doe v. City of Cleveland classified the privacy claim of the plaintiffs in her case as involving the disclosure of private information. 785 F.Supp. at 984. Judge Aldrich then intimated that the Gutierrez conclusion "that plaintiff's medical records are not protected by the constitutional right to privacy," 826 F.2d at 1539, was not controlling in the Doe v. City of Cleveland case as Gutierrez had not dealt with the disclosure of medical information to noncity "third persons." 785 F.Supp. at 985.

The plaintiff in Gutierrez claimed that his alleged constitutional rights to privacy had been violated by a city ordinance that "required [city] employees on sick leave for more than 30 days to complete a form providing the city with medical information." 826 F.2d at 1536. The Sixth Circuit found plaintiff's "case to be indistinguishable from Whalen v. Roe" and held that the city's statutory disclosure requirement amounted to a legitimate request for medical information which did not invade any interest in medical records which could be protected by a constitutional right to privacy. See Gutierrez, 826 F.2d at 1538. Thus, contrary to the interpretation of Judge Aldrich in Doe v. City of Cleveland, the Gutierrez decision

strengthens rather than detracts from the general statement in DeSanti that "[i]nferring very broad 'constitutional' rights where the Constitution itself does not express them is an activity not appropriate to the judiciary." 653 F.2d at 1090.

On the other hand, however, the district court's decision in Doe v. Borough of Barrington, 729 F.Supp. 376 (D.N.J. 1990) does clearly extend its holding to recognize a constitutional right of privacy to the nondisclosure of an HIV/AIDS condition. The Barrington court found that "[t]he government's interest in disclosure [of the HIV positive status of plaintiff's husband] [did] not outweigh the substantial privacy interest involved." Barrington, 729 F.Supp. at 385. Significantly, the Barrington court followed Woods v. White, 689 F.Supp. 874, 876 (W.D. Wis. 1988), aff'd mem., 899 F.2d 17 (7th Cir. 1990) which found a clearly established constitutional right on behalf of prisoners to prevent prison officials from disclosing an inmate's AIDS condition to nonmedical personnel. Like Woods, the Barrington court approved and followed the balancing of interests approach enunciated by United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) to find a constitutional right to the nondisclosure of AIDS information based on the balancing of interests. Yet, it was the very same Westinghouse decision that the Sixth Circuit explicitly disapproved and rejected in J.P. v. DeSanti, 653 F.2d at 1088-89. Therefore, the persuasive impact of Barrington and Woods and the cases that follow their lead hinge on the legitimacy of the general balancing-of-interests paradigm outlined by the Third Circuit in Westinghouse--a paradigm that the Sixth Circuit rejects.[6] Thus, the Barrington

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[6]A general balancing-of-interests approach in this case would not only have to weigh the state's interest in disclosing the truth about John Doe's HIV status, but presumably would have to weigh his privacy interest against other constitutional

decision also does not support a recognition of the "implied" constitutional right of privacy in the nondisclosure of AIDS-related information credited by Judge Aldrich in Doe v. City of Cleveland.

In contrast, Defendant Lockwood and the Niles defendants argue that the recent Sixth Circuit decision of Doe v. Wigginton, 21 F.3d 733 (6th Cir. 1994) controls and not Judge Aldrich's decision relied upon by Magistrate-Judge Perelman. In Wigginton a prison nurse denied the inmate-plaintiff his request for an HIV blood screening test while the plaintiff was housed at the Kentucky State Reformatory. When the grant of a renewed request subsequently revealed plaintiff's HIV positive status, plaintiff attempted to limit that information to his confidential medical file. When plaintiff refused to answer routine questions put to him by a corrections officer regarding his medical condition, however, the officer intentionally accessed plaintiff's confidential medical file. It was at that time that the officer discovered plaintiff's HIV positive status. 21 F.3d at 735-36. Based on that disclosure, plaintiff alleged that his constitutional right to privacy had been violated. 21 F.3d at 740.

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rights such as the implied First Amendment right of access to information arguably acknowledged by Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-76, 579-80 (1980). Cf. Scheetz v. Morning Call, Inc., 946 F.2d 202, 211 (3d Cir. 1991) (Mansmann, J., concurring). But compare, Deutsch v. Federal Bureau of Prisons, 737 F.Supp. 261 (S.D.N.Y. 1990) (prison officials could not be said to have violated any clearly established constitutional right of an inmate to be informed whether his cellmate tested positive for HIV antibodies), aff'd mem., 930 F.2d 909 (2d Cir. 1991).

The discussion in Wigginton of the constitutional right to privacy is not extensive. Nevertheless, Judge Guy, writing for a unanimous court opined:

> Doe next argues that his "constitutional right to privacy" was violated by the disclosure to Sergeant Abbott of his HIV infection. This argument, however, is foreclosed by the letter and reasoning of our decision in *J.P. v. DeSanti* 653 F.2d 1080 (6th Cir. 1981). There, we considered a claim that the constitutional "privacy" rights of juvenile delinquents were violated by the dissemination of their "social histories" to various governmental, social, and religious agencies. Although we acknowledged that "isolated statements" in *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), and *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 868 (1977), when read out of context, lent some support to the juveniles' claim, we noted that recognition of a constitutional right of nondisclosure would force courts to "balanc[e] almost every act of government, both state and federal, against its intrusion on a concept so vague, undefinable, and all-encompassing as individual privacy." 653 F.2d at 1089-90. We further noted that "[i]nferring very broad 'constitutional' rights where the Constitution itself does not express them is an activity not appropriate to the judiciary." *Id.* at 1090. We therefore concluded that "the Constitution does not encompass a general right to nondisclosure of private information." *Id. Accord Paul v. Davis*, 424 U.S. 693, 713, 96 S.Ct. 1155, 1166,

> 47 L.Ed.2d 405 (1976) (rejecting as "far afield from [the privacy] line of decisions" plaintiff's argument that his constitutional right to privacy was violated by police department's disclosure to merchants that plaintiff had department's disclosure to merchants that plaintiff had been arrested for shoplifting). Doe's privacy argument is indistinguishable from that made in *DeSanti*, so we must reject it.

Wigginton, 21 F.3d at 740. See also, R. Rotunda, J. Nowak & J. Young, Treatise on Constitutional Law, Substance & Procedure § 15.7 at 84 (1986) (right of non-disclosure not included among the six categories of fundamental rights recognized by the Supreme Court), cited by Snyder v. Mekhjian, 125 N.J. 328, 343, 593 A.2d 318, 326 (1991) (Pollock, J., concurring).[7]

Likewise, this Court must agree that the Wigginton and DeSanti cases control here. The Magistrate-Judge recognized other decisions which may be read to support an implied constitutional right to the nondisclosure of HIV or AIDS related information. Compare Harris v. Thigpen, 941 F.2d 1495, 1513 (11th Cir. 1991) (recognizing the right of privacy for HIV inmates, but on an arguendo basis) with Fortner v. Thomas, 983 F.2d 1024, 1029 (11th Cir. 1993) ("Although we continue to approach the scope of the privacy right on a case-by-case basis, we now recognize that prisoners retain a constitutional right to

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[7]Compare Watson v. Lowcountry Red Cross, 974 F.2d 482, 492 (4th Cir. 1992) (Widener, J., concurring) (rejecting the implication that a blood donor suspected of being HIV positive "has some kind of constitutionally protected privacy right which must be outweighed by the interest of the plaintiff in obtaining the information").

bodily privacy.") and Kimberlin v. United States Dep't of Justice, 788 F.2d 434, 438 (7th Cir.) (analyzing a inmates's privacy interest in outgoing money transfers based upon a reasonable expectation of privacy test), cert. denied, 478 U.S. 1009 (1986) with Scheetz v. Morning Call, Inc., 946 F.2d 202, 206-07 (3d Cir. 1991) (violations of the confidentiality right of privacy are actionable under § 1983, but information contained in police report is not protected by the confidentiality branch of the constitutional right of privacy), cert. denied, 112 S.Ct. 1171 (1992). This Court also acknowledges that the Second Circuit and Ninth Circuit have come to a contrary conclusion. See Doe v. City of New York, 15 F.3d 264, 266-67 (2d Cir. 1994) (plaintiff possessed a constitutional right to privacy regarding his HIV positive condition) (following Westinghouse, supra); Doe v. Attorney General of the United States, 941 F.2d 780, 796 (9th Cir. 1991) ("[I]t likewise should have been plain to a reasonable government official that information regarding an individual's HIV-status or AIDS diagnosis would fall within the ambit of the privacy protection afforded medical information.") (discussing legitimacy of FBI decision to stop sending agents to physician suspected of being HIV positive) (following

Westinghouse and Woods, supra).[8] These other cases are not controlling, however.

The Court holds that Does v. Wigginton mandates Defendants' motions to dismiss for Plaintiffs' failure to state a claim be granted on the right to privacy claims brought pursuant to the provisions of 42 U.S.C. § 1983. The Constitution does not recognize a right of privacy in the nondisclosure of John Doe's HIV positive status or his AIDS diagnosis actionable under 42 U.S.C. § 1983 given the allegations of this case. As the Supreme Court has stated, there is no "general

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[8]Compare also Doe v. Town of Plymouth, 825 F.Supp. 1102, 1107-08 (D.Mass. 1993) (finding that plaintiff had § 1983 action against police officer who allegedly violated plaintiff's constitutional right to privacy to the nondisclosure of her HIV positive status); Faison v. Parker, 823 F.Supp. 1198, 1201-05 (E.D.Pa. 1993) (inmate had constitutional right to privacy in medical and mental health information contained in a presentence report, which information included the inmate's HIV status); Nolley v. County of Erie, 776 F.Supp. 715, 728-33 (W.D.N.Y. 1991) (policy of placing red sticker on inmate's possessions, revealing her HIV positive status, violated her privacy rights under state law and the Constitution); Arnold v. American Nat'l Red Cross, 93 Ohio App.3d 564, 576 (1994) (volunteer blood donor had constitutional right to privacy which protects against public disclosure of results of HIV test or AIDS diagnosis or AIDS related condition) (citing Doe v. University of Cincinnati, 42 Ohio App. 3d 227, 231 (1988)); Hillman v. Columbia County, 164 Wis.2d 376, 474 N.W.2d 913 (Wis. App. 1991) (inmate-plaintiff's allegations that jail employees disclosed the results of an HIV test, stated a claim for a violation of plaintiff's constitutional right to privacy under 42 U.S.C. § 1983 for which there was no qualified immunity).

constitutional 'right to privacy.'" Katz v. United States, 389 U.S. 347, 350 (1967). Rather, "the protection of a person's *general* right to privacy--his right to be let alone by other people--is, like the protection of his property and of his very life, left largely to the law of the individual States." Katz, 389 U.S. at 350-51 (footnotes omitted).

> That plaintiff tested positive for [HIV], rather than for another, less politically-charged disease, is not relevant to the constitutional analysis. AIDS is a fatal, infectious disease; it is not a political or constitutional status. AIDS does not, therefore, confer on its victims any greater constitutional rights than are possessed by victims of other infectious or fatal maladies, such as herpes, tuberculosis, or cancer. By the same token, AIDS victims do not forfeit any constitutional rights by virtue of their AIDS status.

Plowman v. United States Dep't of the Army, 698 F.Supp. 627, 632 n. 20 (E.D. Va. 1988).

As Plaintiffs' right to privacy allegations fail to state a claim upon which relief can be granted pursuant to 42 U.S.C. § 1983, Defendants are entitled to be dismissed. Fed. R. Civ. P. 12(b)(6).

Finally, in the event that it would become necessary to address the qualified immunity of the defendants in their individual capacities for the causes of action asserted against them under 42 U.S.C. § 1983, this Court holds that the any implied constitutional right on behalf of Plaintiffs to the nondisclosure of HIV or AIDS-related information was not clearly established at the relevant time of the conduct in

question. See generally, Williams by Williams v. Ellington, 936 F.2d 881, 885 (6th Cir. 1991) (summarizing the qualified immunity standards). Accordingly, the individual defendants would be entitled to qualified immunity for the alleged conduct.

III. FEDERAL PROCEDURAL DUE PROCESS AND THE DEPRIVATION OF STATE CREATED RIGHTS

Where a section 1983 claim asserts a violation of the fair procedure guarantees of the Due Process Clause-as opposed to a specific violation of the Bill of Rights or an abridgment of the substantive due process that bars certain arbitrary and wrongful government actions-- "the constitutional violation actionable under § 1983 is not complete when the deprivation occurs," but accrues only when the State fails to provide adequate "procedural safeguards" designed to prevent erroneous deprivations of life, liberty or property. Zinermon v. Burch, 494 U.S. 113, 125-26 (1990). See also Board of Regents v. Roth, 408 U.S. 564, 569-71, 577 (1972) (plaintiff's entitlement to a property or liberty interest must "stem from an independent source such as state law"). In some cases, the State's procedural safeguards are constitutionally sufficient even though they only may provide a postdeprivation hearing or a postdeprivation tort action. In such cases the postdeprivation safeguards satisfy procedural due process "because any predeprivation procedural safeguards that the State did provide, or could have provided, would not address the risk . . ." of those deprivations whose "very nature" "made it impossible for the state to predict." Zinermon, 494 U.S. at 128-29.

In Zinermon, the United States Supreme Court addressed the question whether a 42 U.S.C. § 1983 complaint fails to state a due process claim because the State afforded plaintiff a postdeprivation opportunity to sue defendants in tort

for their allegedly unlawful conduct. 494 U.S. at 115, 117. The Zinermon Court noted that the availability of state remedies "generally [are] irrelevant . . . to the existence of a cause of action under § 1983." 494 U.S. at 124. However, based on Parratt v. Taylor, 451 U.S. 527 (1981) (overruled in part on other grounds by Daniels v. Williams, 474 U.S. 327, 330-31 (1986)) and Hudson v. Palmer, 468 U.S. 517 (1984), the Supreme Court "held that a[n] [intentional] deprivation of a constitutionally protected [life, liberty or] property interest caused by a state employee's random, unauthorized conduct does not give rise to a § 1983 procedural due process claim, unless the State fails to provide an adequate postdeprivation remedy." Zinermon v. Burch, 494 U.S. 113, 115 (1990) (explanatory text added); see id. at 131-32 (no support for categorical distinctions between liberty and property interests).[9] In situations where "the State cannot predict and guard against a deprivation, a postdeprivation tort remedy is all the process the State can be expected to provide, and is constitutionally sufficient." Zinermon, 494 U.S. at 115.

In this circuit, for cases asserting section 1983 procedural due process claims based on the intentional, unauthorized, random acts of state actors, plaintiffs have the burden of pleading and proving that postdeprivation state remedies for redressing the wrong are inadequate. Vicory v. Walton, 721 F.2d 1062, 1063 (6th Cir. 1983), cert. denied, 469 U.S. 834 (1984). "The failure to so plead . . . renders a section 1983 complaint subject to dismissal." Watts v. Burkhart, 854 F.2d 839, 843 (6th Cir. 1988). "[S]o long as there is no systemic problem with the state's corrective process . . .," "[p]olicy considerations do not require a federal hearing in

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[9]Negligent acts by state officials do not give rise to § 1983 liability. Daniels v. Williams, 474 U.S. 327, 336 (1986).

procedural due process cases that can be corrected in state court." Vicory, 721 F.2d at 1065.

Plaintiffs set forth their procedural due process allegations in paragraph 67 of their First Amended Complaint. Plaintiffs allege that Chapter 3701 of the Ohio Revised Code creates a liberty interest in the confidentiality of HIV/AIDS information and that Defendants deprived them of that liberty interest without due process of law. Nowhere in their amended complaint, however, do Plaintiffs assert that the availability of postdeprivation state remedies are inadequate. Nor does it appear that Plaintiffs could make such an allegation and still maintain this action in its current form. Significantly, Counts One, Four, Five, and Six of the amended complaint all attempt to set forth state law causes of action for the same alleged invasions of privacy. Clearly, Ohio has provided several postdeprivation state remedies adequate to satisfy the requirements of the Due Process Clause.

Of course, the substantive due process clause bars "certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" Zinermon, 494 U.S. at 125 (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)). In such cases "the constitutional violation actionable under § 1983 in complete when the wrongful action is taken." Zinermon, 494 U.S. at 125 (citation omitted). This Court recognizes, however, that the Supreme Court has been "reluctant to expand the concept of substantive due process because the guideposts for responsible decision making in this uncharted area are scarce and open-ended." Collins v. City of Harker Heights, 503 U.S. 115, ---, 112 S.Ct. 1061, 1068 (1992). In particular, "[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." Albright v. Oliver, --- U.S. ---, ---,

114 S.Ct. 807, 812 (1994). As explained above, this Court has found no constitutional basis to expand the constitutional right to privacy to the nondisclosure of Plaintiffs' HIV status or AIDS diagnosis under the circumstances alleged here. As such, any substantive due process claims advanced by Plaintiffs also must fail.

If this Court were to find, however, that Plaintiffs' amended complaint did state an actionable due process claim, the Court would also find that the individual defendants were entitled to qualified immunity. Under the circumstances alleged, one cannot fairly say that the nature of the alleged right was so clear that a reasonable official would have understood that the alleged disclosures of Plaintiffs' HIV status or AIDS diagnosis violated Plaintiffs' constitutional rights.

As the claims over which the Court has original jurisdiction do not state a claim for which relief can be granted, the remaining state claims are dismissed without prejudice pursuant to 28 U.S.C. § 1367(c).

IV. CONCLUSION

As Plaintiffs failed to object within the time period permitted by the Federal Rules to the Report and Recommendation as it relates to Defendant Singletary, Plaintiffs have waived a de novo review of that recommendation. The Court follows the Magistrate-Judge's Report and Recommendation that Defendant Singletary be dismissed. The Judgment Entry to be published as a result of this opinion will dismiss Defendant Ray Singletary.

FURTHER, the Court GRANTS Plaintiffs' instanter motion for leave to file the proposed second amended complaint (Docket No. 47) adding the Warren City Board of Health as a

defendant pursuant to Fed. R. Civ. P. 15 and 21 with the understanding that the second amended complaint will not include the dismissed defendant Ray Singletary. Plaintiffs have leave to February 14, 1995 to file their second amended complaint consistent with this opinion. Plaintiffs' Motion to Strike Defendant Singletary's Memorandum in opposition (Docket No. 51) is DENIED.

FURTHER, Counsel for Plaintiffs may conclude, because of the Plaintiffs' physical condition or prognosis, that it would be appropriate to preserve their testimony, given the delay that appellate consideration of the Court's opinion will create. As a consequence, the Court will delay filing the final Judgment Entry in this case until Tuesday, February 21, 1995 so as to permit the plaintiffs John and Jane Doe to perpetuate their testimony. In the event counsel does not wish to wait until that date to begin the appellate process, the Court, upon such notice, will not delay the filing until that date.

After February 21, 1995, the Court will publish its final Judgment Entry granting the motions of the Niles defendants and Defendant Lockwood to dismiss and sua sponte will dismiss Plaintiffs' action against the newly joined defendant, Warren City Board of Health, for the reasons set forth in this Memorandum Opinion.

IT IS SO ORDERED.

/S/
David D. Dowd, Jr.
U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

John Doe, et al.,	)
	) Case No. 4:94CV0568
Plaintiffs,	)
	) Magistrate Judge David
v.	) Perelman
	)
George Lockwood,	) Judge David D. Dowd
et al.,	)
	) REPORT &
Defendants.	) RECOMMENDATION

This case is before the court upon the following four motions: Defendant George Lockwood's motion to dismiss plaintiffs' claims for relief, pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, for lack of subject matter jurisdiction; Defendant Ray Singletary's[1] and Defendant City of Warren's separate motions to dismiss plaintiffs' claims for relief, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, for lack of subject matter jurisdiction; and Defendants City of Niles, Richard Dixon,

[1]The defendant has informed this Court and the parties that although he was designated as "Rudy Singletary" in the plaintiffs' complaint and amended complaint such designation was erroneous.

Richard Wilson, Chris Mannella, and Bruce Bennett (hereinafter "Niles defendants") motion for judgment on the pleadings, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.[2]

Plaintiffs John and Jane Doe have initiated this action seeking monetary relief for alleged deprivation of constitutional rights actionable under 42 U.S.C. §1983, consequent to public identification of the HIV/AIDS[3] status of John Doe and his sexual partners. Plaintiffs have also invoked the pendent jurisdiction of the court, presenting other claims arising under the common law including intentional infliction of emotional distress, invasion of privacy and defamation.

The facts as alleged in the amended complaint and the exhibits of record are as follows.

Plaintiffs John and Jane Doe describe themselves as having been involved in a "committed relationship" with one another and as having made plans to be married.

In August of 1993, while they were living together at a residence in the Niles\Warren area, they were visited by Mr. Ray Singletary, an HIV test counselor for the Ohio Department of Health, at which time he informed the couple that they had been identified as having been exposed to the HIV virus. At the request of Mr. Singletary, the couple underwent testing to

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[2]This Court agrees with the plaintiffs that despite its caption, the motion of the Niles defendants should be deemed as a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

[3]HIV, the Human Immunodeficiency Virus, is the cause of AIDS, Acquired Immunodeficiency Syndrome.

determine whether they had been infected with the HIV virus. They tested positive.

During post-test counseling with Mr. Singletary the couple provided him with names of other sexual partners, so that they could also be informed of their exposure to the virus. Mr. Singletary continued to remain in contact with the couple.

Subsequent thereto, Mr. Singletary discussed with Mr. George Lockwood, Deputy Health Commissioner for the City of Warren, the HIV/AIDS status of John and Jane Doe. He also described to Mr. Lockwood an alleged threat by John Doe that he intended to "infect unknowing female sexual partners."

In September of 1993 John Doe, who had been convicted of receiving stolen property, was incarcerated serving a six-month sentence, during which time he was granted permission to visit (with accompanying police escort, Officer Durst of the Niles Police Department) his private physician for a second HIV test to confirm the prior positive test results. While in the presence of the police escort John Doe's private physician confirmed the prior results and diagnosed him as having AIDS.

During John Doe's incarceration Mr. Bruce Bennett, municipal prosecutor for the City of Niles, showed a female visitor a file containing John Doe's HIV test results.

John Doe continued to suffer health problems and, as a consequence, he requested, from the sentencing court in Niles (Judge Thomas Townley) medical leave in order to receive treatment. As a condition to securing such leave he was required by the judge to admit his HIV status in open court.

In early December of 1993 articles began to appear in local newspapers (The Vindicator and Tribune Chronicle) which described the frustration of Mr. Lockwood with a person who had been diagnosed as having AIDS and who had allegedly threatened to knowingly infect as many others as possible, but whose identity had to be kept confidential by law.[4] In one article, Mr. Lockwood is quoted as saying that he would "like to put [the man's name] on a billboard]," and that he was "checking with the state to see if it's possible to breach confidentiality." In another article, Mr. Lockwood is quoted as follows:

> I'm trying to do whatever I can, short of losing my job. I'd like to get his name in the paper and on a billboard. Confidentiality can only protect someone so far.

In yet another article, Mr. Lockwood stated that two women had contacted him to inform him that they had engaged in sex with John Doe, and that he had encouraged them to testify against John Doe if their HIV test results were positive, even though it was "unclear" whether John Doe knew he was HIV-positive when they had sex with him.

The newspaper articles repeatedly refer to the fact that Mr. Lockwood had contact with the Trumbull County Prosecutor's Office (which has jurisdiction over Niles and Warren) in an attempt to convince that office to investigate and criminally charge John Doe in connection with alleged attempts to knowingly infect others with the HIV virus. In fact, in one article Mr. Thomas Gysegem, Assistant Trumbull County

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[4]The newspaper articles are appended to the original complaint and incorporated by reference into the amended complaint.

Prosecutor, was quoted as stating that his office would work with the law departments of the Cities of Niles and Warren, as well as the Warren Health Department, to accomplish that goal. Detective Richard Dixon of the Niles Police Department was repeatedly quoted in newspaper articles as stating that the allegations of intent to knowingly infect others were "rumors," but that if they were true then John Doe could be criminally liable. No charges were ever filed in that regard.

Newspaper articles up to this point had revealed many details bearing upon John Doe's identity, including his age, area of residence, description of family members, personal relationships and social habits, without naming him.

On December 7, 1993, Officers Richard Wilson and Chris Mannella of the Niles Police Department were dispatched to the scene of a domestic dispute between a man and a woman, neither of whom were related to, or in the presence of, the plaintiffs. Consequent thereto, the officers completed a police report in which the following appeared:

> ACTION TAKEN Spoke with a Spencer Moss who was upset because his girlfriend, Pam O'Brien, had past sexual relationships with the subject, [included here was John Doe's real name], the subject of the current aids controversy (sic).

On the following day, December 8, 1993, the plaintiff was identified in an article appearing in the Tribune Chronicle bearing the headline "AIDS carrier identified; Niles man refuses comment." In fact the first words in the article were John Doe's first and last names, and his name appeared numerous times throughout the article.

Four days later, on December 12th, the editorial bearing the headline "Lockwood manipulated area media" appeared in the Tribune Chronicle. The editorial referred to Mr. Lockwood's attempts to have John Doe publicly identified and, therefore, to "circumvent a law designed to protect the privacy of people with AIDS", by pander[ing] to and incit[ing] public fear." The author also wrote:

> In the meantime, officials were making it easy for us to find out the man's identity. Purposely dropped clues led us to jail records and other evidence. A police officer even mentioned the man's name in a police report on a completely separate incident.

The plaintiffs allege that the public identification of John Doe as being involved in what was referred to locally as the "AIDS controversy," caused their lives to be drastically altered in the following ways: (1) Jane Doe's former husband has won custody of her children after "an ex parte [emergency custody] proceeding where Jane Doe had no opportunity to respond to the charges," which charges included the fact that John Doe had been diagnosed as having AIDS; (2) John Doe has attempted to suicide; (3) both plaintiffs have "become anxious, despondent, depressed, and frightened;" (4) John Doe has received death threats; (5) both plaintiffs have been subjected to "public scorn" and, as a consequence, they "feel unsafe and fearful when attempting to visit family in the Niles-Warren area;" (6) in an attempt to escape their environment, the plaintiffs have moved away from their "home, friends and family;" and (7) the plaintiffs' already poor health has been negatively affected by the ostracism.

The allegations of the plaintiffs' amended complaint are as follows.[5]

In the first cause of action the plaintiffs allege that Defendants Singletary and Lockwood violated Sections 3701.241 and 3701.243 of the Ohio Revised Code by "knowingly" and "in bad faith" disclosing "confidential information about John Doe's HIV status and sexual partners" to third parties.

In the second cause of action the plaintiffs claim that Defendants Singletary, Lockwood, Bennett, Mannella and Wilson disclosed to third parties "the identity and AIDS diagnosis of John Doe," thus depriving them of the right to privacy and rights to liberty and due process of law in violation of 42 U.S.C. §1983.

For their third cause of action the plaintiffs allege that the Cities of Warren and Niles "proximately caused the violation of Plaintiffs' constitutional rights to privacy, liberty and due process of law by pursuing an unconstitutional de facto policy to expose John Doe and his AIDS status". They also assert that the aforementioned cities "failed to train their agents about the stringent confidentiality protections," which amounted to "deliberate indifference to the constitutional rights of Plaintiffs," in violation of 42 U.S.C. §1983.

Plaintiffs' fourth, fifth and sixth causes of action are pendent state law claims against Defendants Singletary, Lockwood, Bennett, Dixon, Mannella and Wilson, in their official individual capacities, for invasion of privacy, intentional infliction of emotional distress, and defamation, respectively,

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[5]In the amended complaint the plaintiffs voluntarily dismissed the Ohio Department of Health as a defendant.

premised upon the same factual allegations as the preceding causes of action.

This Court is required, in ruling upon defendants' motion to dismiss, to accept the factual allegations of the amended complaint as true. Scheuer v. Rhodes, 416 U.S. 232 (1974); Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1025 (6th Cir. 1990), cert. denied, 498 U.S. 1086 (1991). In order for dismissal to be warranted this Court would have to find that plaintiffs could prove no set of facts in support of their claim which would justify the relief sought. Ibid; Thompson v. Superior Fireplace Co., 931 F.2d 372, 374 (6th Cir. 1991).

Turning to the pending motions the issue of whether the plaintiffs' privacy interests under the federal constitution encompass a right to prevent disclosure of HIV/AIDS information is repeatedly presented and could, if answered in the negative, be pivotal in the disposition of all of the motions to dismiss. That being the case, this Court will begin by addressing that issue.

In order to state a cause of action under §1983 plaintiffs must allege: (1) a deprivation of rights, privileges or immunities secured by the United States Constitution or the laws of the United States, and (2) that such deprivation was caused by a person while acting under color of state law. United of Omaha Life Ins. Co. v. Solomon, 960 F.2d 31 (6th Cir. 1992); Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991).

The United States Constitution addresses the following two types of privacy interests: (1) the right to avoid disclosure of personal matters; and (2) the right to independence in making certain significant decisions which are personal in nature. Doe v. Cleveland, 788 F.Supp. 979, 984 (N.D.Ohio 1991), citing

Gutierrez v. Lynch, 826 F.2d 1534, 1538 (6th Cir. 1987). The instant claims for relief invoke the former.

This district court has recognized the constitutional right of privacy under circumstances similar to those presented in the instant case.

In Doe v. Cleveland, 788 F.Supp. 979, 985 (N.D.Ohio 1991), Judge Aldrich held that there was a constitutional right to privacy in the non-disclosure to third parties of information relating to an AIDS diagnosis, stating in part:

> While not all information would be protected by the constitution from disclosure, this Court believes that information relating to AIDS-like information relating to psychiatric treatment-is of a fundamental enough nature to be protected. Thus, this Court finds that Doe had a privacy interest in nondisclosure of this private information. Clearly, there was no legitimate governmental interest to be served by disclosure of the information to [a third party].

In so holding, the court reviewed prior decisions addressing the right to privacy, including P. v. DeSanti, 653 F.2d 1080 (6th Cir. 1981), upon which the defendants rely in the present case. Id. at 984. Judge Aldrich read the DeSanti ruling as stating that although language used in two United States Supreme Court cases, Whalen v. Roe, 429 U.S. 589 (1977) and Nixon v. Administrator of General Services, 433 U.S. 425 (1977), "clouded" the issue of whether there was a privacy interest in the non-disclosure of personal information, there was no "clear indication from the Supreme Court" that such statements could be construed to acknowledge a general constitutional right to

non-disclosure of personal information. Doe v. Cleveland at 984.

Of critical import to the present case, Judge Aldrich further held that DeSanti was "easily distinguishable" from the situation presented in the case before her, as the DeSanti decision addressed the disclosure of information which, based upon the evidence of record, was not highly personal in nature, and which was made to "other governmental type agencies for the use and conduct in their social services mission," as opposed to "indiscriminate disclosure to private parties who had no legitimate basis for receiving the information." Id. at 985.

In reaching her decision in Doe v. Cleveland Judge Aldrich relied upon Doe v. Barrington, 729 F.Supp. 376 (D.NJ 1990), a case this Court also finds to be instructive. In Barrington the court found that a police officer's disclosure of an individual's HIV/AIDS status to third parties (neighbors) violated the right to privacy of the individual's family members. Id. at 385. The Barrington court addressed the sensitive and highly personal nature of information regarding an individual's AIDS diagnosis as follows:

> The sensitive nature of medical information about AIDS makes a compelling argument for keeping this information confidential. Society's moral judgments about the high-risk activities associated with the disease, including sexual relations and drug use, make the information of the most personal kind. Also, the privacy interest in one's exposure to the AIDS virus is even greater than one's privacy interest in ordinary medical records because of the stigma that attaches with the disease. The potential for

> harm in the event of a nonconsensual disclosure is substantial...
>
> The hysteria surrounding AIDS beyond those who have the disease. The stigma attaches not only to the AIDS victim, but to those in contact with AIDS patients...and to those in high risk groups who do not have the disease....Revealing that one's family or household member has AIDS causes the entire family to be ostracized. The right to privacy in this information extends to members of the AIDS patient's immediate family. Those sharing a household with an infected person suffer from disclosure just as the victim does. Family members, therefore, have a substantial interest in keeping this information confidential. Disclosures about AIDS cause a violation of the family's privacy much greater than simply revealing any other aspect of their family medical history.

Id. at 384-385 (Lengthy citation of authorities chronicling the stigma and harassment attendant to disclosure of AIDS diagnosis has been omitted.)

Numerous other courts have reached similar conclusions. See Doe v. Plymouth, 825 F.Supp. 1102 (D. Mass. 1993) (plaintiff had constitutional right to privacy in non-disclosure of HIV status); Harris v. Thigpen, 941 F.2d 1495 (11th Cir. 1991) (court assumed a constitutional right to privacy in non-disclosure of HIV status); Faison v. Parker, 823 F.Supp. 1198 (E.D.Pa 1993) (although the plaintiff had a constitutionally protected interest in the nondisclosure of HIV status, under circumstances of this case the right was not

violated); Nolley v. County of Erie, 776 F.Supp. 715 (W.D.NY 1991) (plaintiff had a right to privacy in the nondisclosure of HIV status to fellow inmates); Woods v. White, 689 F.Supp. 874 (W.D.Wis. 1988), affirmed, 899 F.2d 17 (7th Cir. 1990) (inmates had a right to privacy in the nondisclosure of HIV status).

The defendants contend that the Sixth Circuit Court of Appeals has held in its recent decision in Doe v. Wigginton, 1994 FED App. 0123P (6th Cir. April 19, 1994), that there is no constitutional right to privacy attendant to disclosure of an individual's HIV/AIDS status under any circumstances. This Court disagrees with such an interpretation.

In Wigginton the court held that the privacy argument asserted by the plaintiff was "indistinguishable from that made in DeSanti[.]" 1994 FED App. 123, at page 8. Wigginton involved a corrections officer who, during the course of initial processing of a transferred inmate who refused to answer certain questions, opened the inmate's medical file which was stamped "confidential" and read that the inmate had tested positive for the HIV virus. Id. at 4. The plaintiff had no proof that the corrections officer repeated that information to anyone else. Ibid. The court relied upon the DeSanti case holding that "the Constitution does not encompass a general right to nondisclosure of private information," and rejected the plaintiff's argument that his right to privacy was violated by the disclosure of his HIV status to the corrections officer. Id. at 7.

In this Court's opinion Wigginton is distinguishable from the present case for the same reason that DeSanti was deemed by Judge Aldrich to be distinguishable from Cleveland, being that there was no "indiscriminate disclosure to private parties who had no legitimate basis for receiving the information." Consequently, there was no reason for the court

in Wigginton to address the Cleveland holding, and no indication that Cleveland must be deemed to have been implicitly overruled, as the defendant would have this Court believe.

As a consequence of the foregoing, this Court is of the opinion that disclosure of the plaintiffs' HIV/AIDS information does enjoy constitutional protection under the right to privacy guaranteed by the Fourth and Fourteenth Amendments, so that the plaintiffs in this case have properly alleged a constitutional violation to support a claim for relief under §1983.[6] Accordingly, it is hereby recommended that, insofar as they are premised upon the notion that there was no such right to privacy in the present case, the motions to dismiss on behalf of Defendants Lockwood, City of Niles, Dixon, Wilson, Mannella and Bennett, be denied.

As an alternative argument, the individual defendants contend that they are entitled to dismissal of the claims against them based upon the defense of qualified immunity from liability under §1983 for the acts alleged in the amended complaint, which they claim were undertaken in the course of their performance of official functions and at a time when the plaintiffs' right to privacy in the nondisclosure of HIV/AIDS status was not clearly established under controlling law.

The doctrine of qualified immunity may be raised in a motion to dismiss challenging the sufficiency of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure on

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[6]In light of this Court's determination of violation of privacy rights there is no need to address the plaintiffs' allegations of deprivation of substantive and procedural due process rights, as in the context of stating a claim for relief under § 1983 they are duplicative.

the basis that "the facts pleaded would not show that [their] conduct violated clearly established law of which a reasonable person should have known at the time." Poe v. Haydon, 853 F.2d 418, 425 (6th Cir. 1988), citing Dominique v. Telb, 831 F.2d 673, 676 (6th Cir. 1987). In the event that the question of qualified immunity cannot be resolved on the pleadings, discovery could then be undertaken in that regard, after which summary judgment could still be granted on the basis of qualified immunity. Ibid.

Qualified immunity can be accorded to government officials in the performance of discretionary functions providing that their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Russo v. Cincinnati, 953 F.2d 1036, 1043 (6th Cir. 1992). Stated differently, "The relevant, fact-specific question in qualified immunity cases is whether any official could have, in light of the preexisting law, reasonably believed that his action was lawful." Danese v. Asman, 875 F.2d 1239, 1242 (6th Cir. 1989), cert. denied, 494 U.S. 1027 (1990), citing Anderson v. Creighton, 483 U.S. 635 (1987) and Poe v. Haydon, 853 F.2d 418 (6th Cir. 1988), cert. denied, 488 U.S. 1007 (1989).

Turning to the present case, it is the opinion of this Court that, for each of the following reasons, based upon the facts alleged in the amended complaint the plaintiffs could prove that a reasonable person would have known that some of the acts complained of by the plaintiffs violated clearly established statutory and constitutional rights.

The defendants' general awareness of the plaintiffs' right to privacy in the nondisclosure of their HIV/AIDS status was reported at length in the local newspapers, with the focus of the articles being the frustration of the authorities with their inability

to divulge the identities of the plaintiffs as well as their HIV/AIDS status.[7]

In addition, Doe v. City of Cleveland, supra, had been decided prior to the events which gave rise to the instant case and, therefore, it could be established that a reasonable person would have known that some of the challenged acts violated the rights addressed therein.

Furthermore, under applicable state law, particularly Ohio Revised Code §§3701.241 and 3701.243, with limited exceptions information identifying a person as being either HIV-positive or as having AIDS or ARC (AIDS-related condition) must remain confidential.

Application of the foregoing to the particular defendants, however, dictates differing results.

Defendant Singletary is identified in the amended complaint as an HIV test counselor licensed or certified by the Ohio Department of Health who obtained knowledge of John Doe's HIV status pursuant to the confidential testing and counseling program of the Ohio Department of Health, and disclosed such information to Defendant Lockwood, the Deputy Health Director of the City of Warren. Such disclosure is the sole basis of the §1983 claim against Defendant Singletary.

Section 3701.243(B)(1) of the Ohio Revised Code, states in pertinent part:

> (B)(1) ...[T]he results of an HIV test or the identity of an individual on whom an HIV test is

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[7]The articles alluded to are those appended to the complaint and incorporated into the amended complaint.

> performed or who is diagnosed as having AIDS or an AIDS-related condition may be disclosed only to the following:
>
> ***
>
> (d) The department of health or a health commissioner to which reports are made under section 3701.24 of the Revised Code...

Thus, accepting as true the allegations in the amended complaint, it appears that Defendant Singletary disclosed the plaintiffs' AIDS status to a person designated by law to receive such disclosure, namely the health commissioner to whom such reports were to have been made. In so doing, Defendant Singletary certainly could have believed that such action in conformity with the Ohio statute was lawful.

Consequently, it is this Court's opinion that Defendant Singletary is entitled to qualified immunity for the acts alleged by the plaintiffs and, therefore, entitled to dismissal on the §1983 cause of action against him. In turn, such dismissal would result in dismissal of the pendent state claims against Defendant Singletary, as the sole jurisdictional basis for bringing such claims in federal court would be lacking. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).[8]

The allegations against Defendants Lockwood, Dixon, Bennett, Mannella and Wilson are clearly distinguishable from the Singletary situation, as they involve alleged disclosure by

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[8]Having reached the foregoing conclusion, it is unnecessary for this Court to address each of the alternative theories in support of dismissal raised by Defendant Singletary in his motion.

them of confidential information to third parties who are not listed in the state statute as being entitled to receive such information, and such disclosure is not alleged to have been under any of the particular circumstances described in the statute as allowing such disclosure. When coupled with the media reports incorporated into the amended complaint, and with the pertinent case law on right to privacy in nondisclosure of AIDS status, the doctrine of qualified immunity is inapplicable.

Consequently, it is this Court's conclusion that the balance of the individual defendants are not entitled to dismissal of the plaintiffs' amended complaint for lack of subject matter jurisdiction or failure to state a claim upon which relief may be granted.

The motion to dismiss filed on behalf of the City of Warren is premised entirely upon the theory that George Lockwood, as an employee of the Warren Board of Health, was "not subject to the direction and training of the City of Warren, but of the State of Ohio, through the Board of Health." It is, however, unclear whether this defendant bases the motion on failure to state a claim upon which relief may be granted or lack of subject matter jurisdiction.

In light of the fact that this Court is required, in ruling upon defendants' motions to dismiss, to accept the factual allegations of the amended complaint as true, this motion on behalf of the City of Warren is not appropriately labeled, as its premise is the negation of one of the facts alleged, being the agency relationship between Defendant Lockwood and the City of Warren. The motion of the City of Warren may, however, be deemed as a motion for summary judgment, premised upon the theory that under the law of the State of Ohio the Warren Board of Health was a state agency, so that Mr. Lockwood, as Deputy

Health Director of that board, was a state employee, as opposed to an employee of the City of Warren, all of which would entitle the City of Warren to judgment as a matter of law.

Plaintiffs assert that such a summary judgment motion should be denied, as the City of Warren has failed to demonstrate an absence of genuine issue of material fact. According to the plaintiffs, Ohio statutory law provides that pursuant to a municipality's home rule authority a city may create its own municipal health district. The plaintiffs assert that the fact that there state case holdings indicating that a local health district may be an agency of the state is not dispositive of the issue of whether this particular health district is such an agency, considering that the aforementioned statutory provision contemplates a city creating its own health district.

Defendant Singletary has also filed a brief challenging the contention of the City of Warren that Mr. Lockwood was an employee of the State of Ohio, arguing instead that the Warren City Board of Health is a political subdivision as defined in Sections 109.36(C) and 2744.01(F) of the Ohio Revised Code.

This Court has reviewed the applicable statutory provisions, and is of the opinion that they fail to specifically address whether the deputy director of a city board of health is an employee of the city or of the state.

Under Ohio statutory law, health districts are created in the following manner:

> The state shall be divided into health districts. Each city constitutes a health district and shall be known as a "city health district."

> The townships and villages in each county shall be combined into a health district and shall be known as a "general health district."
>
> As provided for in sections 3709.07, 3709.071 [3709.07.1], and 3709.10 of the Revised Code, there may be a union of two or more contiguous general health districts, not to exceed five, a union of two or more contiguous city health districts to form a city health district, or a union of a general health district and one or more city health districts located with or partially within such general health district.

Ohio Revised Code §3709.01.

The City of Warren has conceded the existence of a city health district, as provided for in the first paragraph of the foregoing.

The board of health of such a health district is created pursuant to Ohio Revised Code §3709.05, which states in pertinent part:

> Unless an administration of public health different from that specifically provided in this section is established and maintained under authority of its charter, or a combined city health district is formed under the provisions of section 3709.051 [3709.05.1] of the Revised Code, the legislative authority of each city constituting a city health district shall establish a board of heath....

Pursuant to Ohio Revised Code §3709.16, it is the board of heath of a city, as opposed to the city, which determines the duties and fixes the salaries of its employees. While not directly responsive to the question raised herein, this factor does suggest that an employee of the city board of health is not deemed to be an employee within the control of the city.

While the foregoing provisions address the creation of, and operation of, city health districts and their boards of health, they fail to clearly define whether such districts are entities of the city, state, or entirely separate governmental entities.

The question of whether they are separate entities was addressed by the Ohio Supreme Court in Harrison v. Judge, 63 Ohio St. 3d 766, 591 N.E.2d 704 (1992). In asserting that an employee of the board of health is not within the control of the city, the City of Warren relies heavily upon that decision, in which the Ohio Supreme Court held that for purposes of collective bargaining between a city board of health and its employees, the city board of health and the city were "separate entities." Id. at 768. In so holding, the court addressed the fact that a city was empowered, under Ohio Revised Code §3709.05, to invoke its home rule authority to create a board different in structure from that which was described by statute, but such authority would extend "only to powers the state legislature allows." Ibid.

Applying the holding of the Ohio Supreme Court in Harrison, as well as the statutory language of §3709.16, to the particulars of the present case, this Court is of the opinion that the Warren City Board of Health must be considered as an entity separate from the City of Warren.[9]

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[9]Having so stated, this Court would observe that unless required to do so for purposes of decision it is not the

Consequently, this Court recommends that the motion of the City of Warren, deemed as a motion for summary judgment, be granted.[10]

In summary, it is hereby recommended that the motions to dismiss on behalf of Defendants Lockwood, City of Niles, Dixon, Wilson, Mannella and Bennett, be denied, and that the motion to dismiss on behalf of Defendant Singletary and the motion filed on behalf of the City of Warren, treated as a motion for summary judgment, be granted.[11]

/S/
DAVID S. PERELMAN
United States Magistrate Judge

DATE: October 27, 1994

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province of the federal courts to determine unresolved issues of state law. Therefore, this Court is no constrained to precisely determine the status of the Warren City Board of Health, i.e., is it a state agency, an independent entity, or some peculiar hybrid creature. So long as it can be determined that it is not a part of the City of Warren that is all that need be found in order to rule upon the motion presented by the City.

[10]Defendant Lockwood may nonetheless be found to be individually liable under § 1983 as he alleged to have acted under color of state law.

[11]The entire original file is being transmitted to Your Honor with this Report and Recommendation. As this action was referred for general pretrial supervision the file should be returned for that purpose following Your Honor's ruling on these motions.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN DOE c/o MARTINDALE & BRZYTWA	)	CIVIL ACTION NO. 4:94 CV 0568
and	)	JUDGE DAVID D. DOWD MAGISTRATE JUDGE DAVID S. PERELMAN
JANE DOE c/o MARTINDALE & BRZYTWA	)	
Plaintiffs,	)	
v.	)	
GEORGE LOCKWOOD In his official capacity as Warren Deputy Health Commissioner and individually	)	
and	)	
	)	SECOND AMENDED COMPLAINT

WARREN CITY BOARD OF HEALTH c/o Daniel J. Sferra, Chairman and CITY OF NILES and RICHARD DIXON In his official capacity as Detective for the City of Niles and individually and RICHARD WILSON In his capacity as a Niles Police Officer and individually. and CHRIS MANNELLA In his capacity as a Niles Police Officer and individually. and BRUCE BENNETT In his capacity as	)	FOR VIOLATION OF CONSTITUTIONAL AND CIVIL RIGHTS

Municipal Prosecutor)
and individually.)
)
Defendants.)

I. INTRODUCTION

1. This action arises from the concerted efforts of certain state and local officials who, through a systematic barrage of unfounded accusations, along with other harassing conduct, destroyed two individuals' dignity, their home and family lives, and maliciously branded them as public scourge. The state and local officials' conduct was based upon unfounded rumors and hysteria, along with a bias which can only be characterized as racial hatred.

2. The state and local officials, in total disregard for the Plaintiffs' individual, constitutional and civil rights, repeatedly and publicly accused John Doe of attempting to intentionally infect area (white) women with the HIV virus. The Defendants, in pursuit of their illconceived plan to victimize John Doe and hold him to public scorn, publicly disclosed his identity as both a carrier of the HIV virus and as an "intentional infector."

3. The Defendants conducted an organized witch hunt wherein they sought to obtain criminal complainants who would testify that John Doe had infected them with the HIV virus intentionally. Although the Defendants' efforts had been sustained in this regard for a number of months, they have been unable to manufacture any such complainant. This is because the accusations by Defendants are all patently false, malicious and motivated by bad faith.

4. The concerted, malicious conduct of Defendants also directly caused the loss by Jane Doe of the custody of her children, and further created a hostile, intolerable environment which she was forced to flee.

5. This lawsuit is an action in which Plaintiffs seek compensatory and punitive damages as a result of the Defendants' violation of their constitutional and civil rights, for intentional infliction of emotional distress, invasion of privacy and defamation.

II. JURISDICTION, VENUE AND PARTIES

A. Jurisdiction

6. This Court has jurisdiction of this action under 28 U.S.C. Section 1331, in that it arises under the constitution and laws of the United States; under 28 U.S.C. Section 1343 (a) (3), in that it is brought to redress deprivations, under color of State Authority, of rights, privileges and immunities secured by the United States Constitution and Acts of Congress providing for equal rights of citizens; under 42 U.S.C. Section 1983 and under the doctrine of pendent jurisdiction.

B. Venue

7. Venue is proper in this Court under 28 U.S.C. Section 1391 (d) because all of the Defendants reside in this District and because Plaintiffs' claims arose here.

C. Parties

8. Plaintiff John Doe ("John Doe") is an individual whose identity is being withheld in accordance with

the provisions of Chapter 3701 of the Ohio Revised Code. John Doe formerly resided in the Niles and Warren, Ohio area, but as a result of Defendants' tortious, malicious, illegal and unconstitutional conduct in disclosing his AIDS status, and in falsely accusing him of criminal conduct, has been forced to abandon his home to seek safety in another area of the State, within this District.

9. Plaintiff Jane Doe ("Jane Doe") is an individual whose identity is being withheld in accordance with the provisions of Chapter 3701 of the Ohio Revised Code. For the past year, Plaintiffs John Doe and Jane Doe have been involved in a romantic, committed relationship, and the couple plans to marry soon. Jane Doe formerly resided in the Niles and Warren area with her two children, but as a result of Defendants' tortious, malicious, illegal and unconstitutional conduct as set forth herein, has had her children removed from her custody and was forced to abandon her home to seek safety in another area of the State, within this District.

10. Defendant George Lockwood is the Warren, Ohio Deputy Health Commissioner who tortiously, maliciously, illegally, unconstitutionally and without due process of law disclosed the identity of John Doe and his AIDS status and who has falsely accused Plaintiff of knowingly and premeditatively infecting other individuals with the AIDS virus.

11. Defendant Warren City Board of Health is a political subdivision which, through official policy or custom and/or failure to train its agents, illegally, unconstitutionally and without due process of law caused the disclosure of John Doe's identity and AIDS status.

12. Defendant City of Niles is a municipal corporation which, through official policy or custom and/or failure to train its agents, illegally, unconstitutionally and without due process of law caused the disclosure of John Doe's identity and AIDS status.

13. Defendant Richard Dixon is a detective for the City of Niles who, tortiously, maliciously, illegally, unconstitutionally and without due process of law disclosed the identity of John Doe and his AIDS status.

14. Defendant Richard Wilson is a police officer for the City of Niles who, tortiously, maliciously, illegally, unconstitutionally and without due process of law disclosed the identity of John Doe and his AIDS status.

15. Defendant Chris Mannella is a police officer for the City of Niles who, tortiously, maliciously, illegally, unconstitutionally and without due process of law disclosed the identity of John Doe and his AIDS status.

16. Defendant Bruce Bennett is a municipal prosecutor for the City of Niles who, tortiously, maliciously, illegally, unconstitutionally and without due process of law disclosed the identity of John Doe and his AIDS status.

III. FACTS AS TO ALL CLAIMS

17. In August 1993, the Ohio Department of Health came to John Doe and Jane Doe, at their residence, and through Rudy Singletary ("Singletary", an employee of the Ohio Department of Health) informed them that they had been identified as exposed to the HIV virus. At Singletary's request, John Doe and Jane Doe underwent a confidential test for HIV through the Ohio Department of Health. Singletary

later informed Plaintiffs that their test results were positive, meaning that they tested positive for carrying an antibody for the human immunological virus which is associated with AIDS, (acquired immune deficiency syndrome).

18. Plaintiffs received post-test counselling from Singletary who presented himself as a trained agent of the Ohio Department of Health. As required by state law, the Plaintiffs provided the names of sexual contacts in order that the state's confidential partner notification system could be implemented.

19. The state's confidential partner notification system, required by the Ohio Revised Code §3701.241, does not actually exist. In fact, each health district is making up its own guidelines, or failing to, and acting in accordance therewith. But regardless of local rules, all information about sexual contacts obtained through a confidential HIV test must remain confidential under §3701.241 and §3701.243 of the Ohio Revised Code.

20. Singletary did not terminate his communications with Plaintiffs following the post-test counselling; rather, Singletary determined that he would continue contacting Plaintiffs for the supposed purpose of monitoring Plaintiffs' activities and sexual contacts. This is, upon information and belief, a practice in which Singletary has engaged with other individuals whom he knows have tested positive for the HIV virus. In fact, numerous individuals have complained that they feel harassed by Singletary's vigilante approach to the disease and those infected.

21. Sometime in the early fall of 1993, Singletary and Defendant Lockwood had discussions regarding John Doe

which reportedly included a threat received by Singletary from John Doe to intentionally infect unknowing female sexual partners. See A-1, A-3.

22. Singletary, and Lockwood, on behalf of the Defendant Warren City Board of Health, set up a vigilante-like effort to expose the John Doe's identity and AIDS status as well as to obtain a criminal indictment against him in connection with activities for which they had no proof whatsoever.

23. In September, 1993, John Doe was incarcerated in connection with having been found guilty of receiving stolen property after refusing to identify the true perpetrator. He was awaiting confirmation of his HIV status from his private physician while in custody and was granted permission to see his physician in connection with the test results, providing he was under police escort. Confirmation testing is common practice due to the possibility of false positive results in certain individuals.

24. Niles police officer Durst, escorted John Doe to his physician, never left Plaintiff's presence and was with him when he received a confirmation of his HIV positive status, and an AIDS diagnosis, from his physician.

25. John Doe was returned to Niles where he continued to suffer numerous health complications related to his blood disorder. John Doe requested medical leave from the Court for treatment of his blood disorder, and, without the assistance of counsel, was forced by Judge Townley, an employee of Defendant Niles, to state in open court that his blood disorder was an HIV infection. See A-9. This was done by Defendant Niles in total disregard for Plaintiff's constitutional and civil rights, in violation of Ohio law and

done despite the fact that the Judge had previously reviewed the AIDS diagnosis from John Doe's private physician.

26. While incarcerated, following the receipt of his private physician's confirmation of his AIDS status, but prior to his request for medical leave, a female friend of John Doe came to visit him. She was stopped by Defendant Bennett at the Niles Courthouse after requesting permission to see Plaintiff. Bennett took John Doe's friend to his office and showed her a file containing John Doe's AIDS tests results. Bennett did not have a court order authorizing him to make such a disclosure, nor was he acting in compliance with any other provision of state law in making such a disclosure. Bennett's action, while undertaken in his official capacity, was not in furtherance of any legitimate prosecutorial conduct. Bennett's action was in bad faith.

27. Shortly after the foregoing, Defendant Lockwood, continuing in his self appointed vigilante role, began to engage in a campaign to publicly identify John Doe and his AIDS status. Lockwood's efforts were in willful, knowing violation of the law. See A-1.

28. Upon information and belief, Lockwood began to coordinate his efforts with the Trumbull County Prosecutor's Office, having jurisdiction over the cities of Warren and Niles, to investigate and criminally charge Plaintiff in connection with the false accusations that John Doe was an "intentional infector." See A-2.

29. Upon information and belief, Lockwood, and the cities of Warren and Niles, set up a dragnet covering all of John Doe's sexual contacts as disclosed by Plaintiff to Singletary pursuant to the supposed confidential partner notification "System." However, the efforts of Lockwood,

and the cities of Niles and Warren, were not conducted as part of the notification system; rather, they were conducted in an effort to victimize the Plaintiffs, publicly humiliate them, and criminally indict John Doe for conduct which Defendants have been, and continued to be unable to prove.

30. Defendant Lockwood, apparently frustrated by his failed efforts to criminally indict and expose John Doe as an "intentional infector", began to manipulate the area media for the purpose of, in Lockwood's words, exposing John Doe's name "in the paper and on a bill board." See A-2.

31. In connection with his efforts in manipulating area media, Lockwood made a series of malicious, false and misleading disclosures designed to and in fact identifying John Doe and his AIDS status, and further publicly accusing him of criminal activity for intentionally infecting unsuspecting sexual partners. See A-3.

32. During the course of Defendants' media manipulation, the Trumbull County Prosecutor announced in the newspaper that he had become involved in the joint effort of the Niles and Warren City Police Departments and the Warren City Board of Health for the purpose of criminally charging Plaintiff as an intentional infector. See A-3.

33. Defendant Richard Dixon, a detective for the City of Niles, participated enthusiastically in Lockwood's media campaign to expose John Doe. In the Tribune Chronicle, Dixon repeated that the allegations, by his own admission, were unfounded rumors, that John Doe was "out to get people". Dixon further explained that if the allegations were true, then Doe could be criminally liable for assault. See A-3.

34. Defendants continued manipulating the media, by releasing false and malicious reports, by working the public into a frenzy over John Doe's identity and activity, by leaking information and creating an environment of extreme hostility and intolerance for Plaintiffs.

35. The Defendants' joint efforts and dragnet failed to turn up any supposed victims who had been intentionally infected by John Doe despite concentrated efforts and extensive media coverage of the false allegations.

36. By December 7, 1993, the publicity campaign launched by Defendants to expose John Doe and his AIDS status had largely succeeded. Officials had leaked detailed background information about John Doe, including his age, area of residence, family, relationships and social habits, to local area newspapers. From the published newspaper accounts, Jane Doe's former husband deduced that John Doe was the subject of the AIDS controversy.

37. On the basis that John Doe, Jane Doe's fiance, had AIDS, Jane Doe's former husband filed an affidavit in support of an emergency proceeding to remove Jane Doe's children from her custody. Significantly, the allegation that John Doe had AIDS was listed first on the affidavit, followed by standard allegations of child abuse and neglect. The latter allegations of abuse and neglect were employed as a subterfuge to conceal the actual, and illegitimate, basis for the emergency custody proceeding: John Doe's AIDS diagnosis. Jane Doe in fact lost custody of her young children on that basis in an exparte proceeding where Jane Doe had no opportunity to respond to the charges. The stigma created by Defendants was utilized to deprive Jane Doe of her family, dignity and home.

38. In December, 1993 the Niles police were called to the scene of domestic violence between a man and a woman, neither of whom were related to the Plaintiffs, and neither of whom were in the presence of the Plaintiffs.

39. In completing the official, public report regarding the domestic violence, Defendants Wilson and Mannella willfully, knowingly and in contravention of Ohio law and Plaintiff's constitutional and civil rights, disclosed John Doe's specific personal identity and AIDS status as being the reason why the male, involved in the domestic violence incident, was "upset." See A-8.

40. The sole purpose for specifically identifying John Doe in the police report was to conclusively and further identify John Doe and his AIDS status in accordance with the scheme and joint efforts of Defendants. Defendants then led the media to the report as a way of publishing John Doe's name and AIDS status. On December 8, 1993, John Doe's name was printed on the front page of the Tribune Chronicle, beneath the headline: AIDS carrier identified; Niles man refuses comment. See A-6.

41. Defendants City of Niles and Warren City Board of Health failed or refused to terminate the aforementioned activities of the individual Defendants, and failed or refused to discipline or otherwise properly supervise the individual Defendants who engaged in those practices. These entities have not effectively trained their agents with regard to the proper constitutional and statutory limits on conduct in connection with protocol required when dealing with the identity of individuals who test positive for the HIV virus, or who have AIDS.

42. As a result of the foregoing conduct, Plaintiffs have suffered, and have become anxious, despondent, depressed, and frightened. John Doe has attempted suicide. John Doe has received death threats and both Plaintiffs received public scorn. They feel unsafe and fearful when attempting to visit family in the Niles-Warren area. Jane Doe has lost custody of her children.

43. Plaintiffs have had to abandon their home, friends and family to seek safe domicile away from Niles and Warren because Defendants' combined conduct has created a toxic and hazardous environment in which they could no longer exist.

44. Plaintiffs' shortened lives resulting from their health condition, are now further tortured and intolerable as a result of the loss of home and family and the public scorn, shame and humiliation which has been maliciously inflicted upon them by Defendants.

IV. COUNT ONE

(Disclosure of HIV information in violation of Sections 3701.241 and 3701.243 of the Ohio Revised Code)
(Individual Liability)

45. Plaintiffs reallege and incorporate by reference herein each and every allegation contained in paragraphs 1 through 44 of this Complaint.

46. In late August or early September, 1993, Singletary disclosed confidential information about John Doe's HIV status and sexual partners to Defendant George Lockwood, the Warren Deputy Health Director. This

disclosure was made in such a way as to identify John Doe, his HIV status, and his sexual partners.

47. Such disclosure was made by Singletary knowingly, in bad faith, and in violation of Sections 3701.241 and 3701.243 of the Ohio Revised Code. According to these statutes, information which identifies an individual as HIV-positive or as diagnosed with AIDS must remain confidential. Likewise, information about the sexual partners of one who has been tested for HIV, obtained through a confidential system of testing, counseling and partner notification, must remain confidential.

48. Defendant George Lockwood, in his official capacity as Warren Deputy Health Director, is an agent of state or local government.

49. Defendant Lockwood acquired confidential information about John Doe's HIV status and sexual partners while employed as Warren Deputy Health Director.

50. On information and belief, in the autumn of 1993, Defendant Lockwood disclosed the identity of John Doe and his AIDS diagnosis, as well as confidential information about John Doe's sexual partners, to law enforcement officials in Trumbull County, including but not limited to: Thomas Gysegem, Trumbull County Assistant Prosecutor; Bruce Bennett, Prosecutor for the City of Niles Municipal Court; Richard Dixon, Detective for the City of Niles; the Police Department for the City of Niles, including Defendants Chris Mannella and Richard Wilson; and the Police Department for the City of Warren.

51. These disclosures by Defendant Lockwood were not made pursuant to a search warrant issued by a

magistrate. Therefore, these disclosures to law enforcement officials were not authorized by Section 3701.243(B)(h) of the Ohio Revised Code.

52. In early December, 1993, Defendant Lockwood also disclosed information about John Doe's AIDS diagnosis and information about his sexual partners to two local newspapers. In making these disclosures, Defendant Lockwood revealed sufficient background information about John Doe to disclose his identity, even if he did not reveal John Doe's name.

53. These disclosures by Defendant Lockwood were not made pursuant to an order by the court of common pleas. Therefore, these disclosures by Lockwood to local media were in violation of Section 3701.243(C) of the Ohio Revised Code.

54. All of the disclosures by Defendant Lockwood were made knowingly, in bad faith, and in flagrant violation of the confidentiality provisions of Sections 3701.241 and 3701.243 of the Ohio Revised Code.

55. Plaintiffs John Doe and his fiance, Jane Doe, have been injured by the unauthorized disclosures of John Doe's AIDS status. Both Plaintiffs have standing to pursue a civil action for violation of Sections 3701.241 and 3701.243 of the Ohio Revised Code.

V. COUNT TWO

(Liability of political subdivision for violation of rights protected under Sections 3701.241 and 3701.243 of the Ohio Revised Code)

56. Plaintiffs reallege and incorporate by reference herein each and every allegation contained in Paragraphs 1 through 55 of this Complaint.

57. Defendant Warren City Board of Health (hereafter "Board") is a political subdivision pursuant Sections 2744.01(C)(2)(n) and (F) of the Ohio Revised Code. The Defendant Board is a governmental agency responsible for managing the Warren City Department of Health. The Defendant Board is neither an agency of the City of Warren nor an agency of the State of Ohio.

58. At all times relevant to the matters alleged in this Count, the Defendant Board was engaged in providing a health care service by managing the Warren City Department of Health. This is a governmental function pursuant to Section 2744.01(C)(2)(n) of the Ohio Revised Code.

59. In the autumn of 1993, the Defendant Board acquired information about John Doe's identity, HIV status and sexual partners through its agent, Defendant George Lockwood. This information is protected by stringent confidentiality safeguards outlined in Chapter 3701 of the Ohio Revised Code.

60. In the autumn of 1993, the Defendant Board was also provided with false allegations that John Doe had knowingly infected two women and a baby. See A-5. The

names of the two women infected were provided by John Doe to the Ohio Department of Health in confidence pursuant to the confidential partner notification system referred to in Chapter 3701 of the Ohio Revised Code. Significantly, John Doe voluntarily revealed this information about his sexual contacts before he learned of his HIV status. Therefore, whether or not John Doe actually infected these women, he did not infect them knowingly because he did not learn of his HIV status until late August or early September 1993.

61. Upon receiving confidential information about John Doe's identity, HIV status and AIDS diagnosis, and sexual partners, the Defendant Board did not take steps to ensure that confidentiality would be maintained. Rather, the Defendant Board allowed its agent, Defendant George Lockwood, to casually disseminate this confidential information first to law enforcement authorities in Niles and Warren, and then to local medial sources.

62. The Defendant Board also acquiesced in the efforts of its agent, Defendant Lockwood, to manipulate the media. From the inception of Lockwood's media campaign to expose John Doe, Lockwood "said he is checking further ... to see if it's possible to breach confidentiality in this kind of case." See A-2. Despite Lockwood's obvious intention to expose John Doe, the Defendant Board did not act to prevent Defendant Lockwood from making further disclosures. As a result, Defendant Lockwood escalated the intensity of his media campaign and successively revealed more and more information about John Doe.

63. Such disclosures by Defendant Lockwood, an agent of the Defendant Board, were made, at best, with negligent disregard of the privacy rights of John and Jane Doe.

64. In the alternative, Defendant Lockwood's disclosures were made in bad faith, with reckless and even knowing disregard of state confidentiality laws outlined in Chapter 3701.

65. The Defendant Board's failure to ensure the confidentiality of information concerning John Doe's identity, HIV/AIDS status and sexual partners, and its tacit approval of Lockwood's efforts to "corral" John Doe through the media, proximately caused the media's identification of John Doe as an "AIDS carrier."

66. Plaintiffs John Doe and Jane Doe have been injured by the unauthorized disclosures of John Doe's AIDS diagnosis and information about his sexual partners. Both

67. The Defendant Board is liable for injuries suffered by the Plaintiffs as a result of the Board's failure to protect and maintain the confidentiality of John Doe's identity and AIDS-related information in violation of Chapter 3701 of the Ohio Revised Code. The violation of Plaintiffs' privacy rights outlined in Chapter 3701, the Defendant Board is liable as a political subdivision pursuant to Chapter 2744 of the Ohio Revised Code.

VI. COUNT THREE

(Violation of Civil Rights under 42 U.S.C. Section 1983)
(Liability of Individuals)

68. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 67 of this Complaint.

69. At all times relevant to the matters alleged in this Count, all Defendants were acting under color of state law.

70. Defendant George Lockwood, as Warren Deputy Health Director, disclosed the identity and AIDS diagnosis of John Doe, as well as confidential information regarding John Doe's sexual partners, to a number of law enforcement officials in Trumbull County and to local media sources.

71. Defendant Richard Dixon, as a Detective for the City of Niles, disclosed detailed background information about John Doe, including his age, area of residence, family, relationships and social habits, to local media sources. Defendant Dixon also reiterated to media sources the confidential information about John Doe's sexual partners, his AIDS diagnosis, and the false rumor that John Doe was "out to get people." See A-3.

72. Defendant Bruce Bennett, as the Municipal Prosecutor for the City of Niles, disclosed the identity and AIDS diagnosis of John Doe to a friend of John Doe's who came to visit him at the Niles correctional facility. When John Doe's friend arrived at the jail
on September 17, 1993, Defendant Bennett pulled her aside and stated, "I don't know how intimate you were with [John Doe,] but here are his HIV test results." Defendant Bennett then showed her a file containing information about John Doe's AIDS diagnosis. Until this moment, John Doe's friend did not know that John Doe had AIDS.

73. Defendants Chris Mannella and Richard Wilson, as Police Patrolmen for the City of Niles, disclosed the identity and AIDS diagnosis of John Doe on a police report. The police report, dated December 7, 1993, named

John Doe specifically as "the subject of the current aids [sic] controversy." See A-8. However, John Doe himself was not the subject of the police report. The incident reported by Defendants Mannella and Wilson was a domestic dispute between a woman and her boyfriend.

74. As a proximate result of the successive disclosures by Defendants Lockwood, Bennett, Mannella and Wilson, the local media completed the identification of John Doe as an "AIDS carrier." On December 8, 1993, John Doe's name and AIDS status was printed in a story which ran on the front page of the Tribune Chronicle. See A-6. Immediately after the story was printed, it was apparent to Plaintiffs John Doe and Jane Doe that they would not be safe anywhere in Trumbull County.

75. The successive disclosures by Defendants Lockwood, Bennett, Mannella and Wilson proximately caused the violation of Plaintiffs' rights to privacy. Plaintiffs' rights to privacy, which encompass the right to prevent disclosure of HIV/AIDS information, are secured by the Fourth and Fourteenth Amendments of the U.S. Constitution and by Article I, Section 1 of the Ohio Constitution. This privacy right extends not only to an individual, but also to those intimately associated with him, such as family members. Therefore, both John Doe and Jane Doe, his fiance, may assert their constitutional rights to privacy under 42 U.S.C. Section 1983.

76. The successive disclosures by Defendants Singletary, Lockwood, Bennett, Mannella and Wilson proximately caused the violation of Plaintiffs' rights to liberty and due process of law. Plaintiffs' rights to liberty and procedural due process are secured by the Fourteenth Amendment to the U.S. Constitution. Plaintiffs' liberty

interest in maintaining the confidentiality of HIV/AIDS information is created by Chapter 3701 of the Ohio Revised Code. However, since the Defendants disclosed John Doe's AIDS diagnosis without obtaining a court order to authorize the disclosures pursuant to Section 3701.243(C), the Defendants have deprived the Plaintiffs of their liberty interest without due process of law.

77. Plaintiffs John Doe and his fiance, Jane Doe, have been injured by the unauthorized disclosures of John Doe's AIDS status. As a proximate result of Defendants' disclosures, Jane Doe lost custody of her two young children in an emergency ex parte proceeding. Thus, Jane Doe has been deprived of her familial privacy and of a fundamental liberty interest in her parent/child relationship, without due process of law.

VII. COUNT FOUR

(Violation of Civil Rights under 42 U.S.C. Section 1983)
(Liability of Political Subdivision and Municipality)

78. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 77 of this Complaint.

79. Defendant Warren City Board of Health is a political subdivision in the State of Ohio which assumes government functions in operating the Department of Health for the City of Warren. The Warren City Board of Health is independent, being neither an agency of the city of Warren nor an agency of the State of Ohio. Defendant Warren City Board of Health was at all times relevant to the allegations in this Count acting under color of state law.

80. Defendant City of Niles is a municipal corporation in the State of Ohio. Defendant City of Niles was at all times relevant to the allegations in this Count acting under color of state law.

81. Defendants, the Warren City Board of Health and the City of Niles, pursued an unconstitutional de facto policy of willfully disclosing the identity, AIDS diagnosis, and sexual partners of Plaintiff John Doe. The confidential information regarding John Doe's AIDS diagnosis and sexual partners was casually shared among the Warren Department of Health, the legal departments of the City of Warren and the City of Niles, the Trumbull County Assistant Prosecutor, and the police departments of the City of Warren and the City of Niles. The successive, systematic disclosure of information describing John Doe, his AIDS diagnosis, and his personal life to the Trumbull County media fairly reflects a de facto municipal policy to disclose enough information to identify John Doe as "the subject of the current aids [sic] controversy."

82. Defendants, the Warren City Board of Health and the City of Niles, proximately caused the violation of Plaintiffs' constitutional rights to privacy, liberty and due process of law by pursuing an unconstitutional de facto policy to expose John Doe and his AIDS status.

83. Defendants, the Warren City Board of Health and the City of Niles, failed to train their agents about the stringent confidentiality protections for HIV/AIDS information outlined in Chapter 3701 of the Ohio Revised Code, and existing under the Ohio Constitution and the United States Constitution.

84. Defendants' failure to train their agents about these statutory protections for HIV/AIDS information reflects a deliberate indifference to the constitutional rights of Plaintiffs.

85. Defendants' failure to train their agents and deliberate indifference to the rights of Plaintiffs proximately caused damages to, and the violation of John Doe's and Jane Doe's constitutional rights to privacy, liberty, and due process of law.

VIII. COUNT FIVE

(Pendent State Claim: Invasion of Privacy)

86. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 85 of this Complaint.

87. When Plaintiff John Doe agreed to let Defendant Rudy Singletary perform an HIV test and post-test counseling, Plaintiffs had a reasonable expectation of privacy in the sensitive medical information obtained by the Ohio Department of Health. Given Ohio standards governing the confidentiality of HIV testing, counseling and partner notification, Plaintiffs expected that the information about John Doe's HIV status and sexual partners would remain confidential.

88. Defendants Lockwood, Bennett, Dixon, Mannella and Wilson -- both in their official capacities and in their individual capacities -- intentionally disclosed the identity of John Doe, his AIDS diagnosis, and information about his sexual partners to various state and local government officials and to the Trumbull County media.

89. Defendants Lockwood, Bennett, Dixon, Mannella and Wilson, in their official capacities, made these disclosures maliciously and in bad faith, with the intention of publicly branding John Doe with a scarlet "A" for AIDS. All Defendants, in their official capacities, made these disclosures in willful violation of Ohio statutes which protect the confidentiality of HIV information.

90. The disclosure by all Defendants of John Doe's AIDS diagnosis and information about his sexual partners to the local media wrongfully publicized Plaintiffs' private affairs. The sensitive medical information, entrusted in confidence to an agent of the Ohio Department of Health, concerning John Doe's AIDS diagnosis and information about his sexual partners was not a matter of legitimate public concern.

91. The publicity which raged in Trumbull County headlines for the first two weeks of December, 1993, concerning John Doe's AIDS diagnosis and sexual partners proximately resulted from the successive disclosures made by Defendants. The publicizing of John Doe's private affairs caused extreme mental anguish, shame and humiliation to Plaintiffs. Anyone with ordinary sensibilities would experience similar mental suffering at the highly publicized disclosure of sensitive medical information, as well as the associated occasions of criminal activities.

92. As a result of the public disclosure of John Doe's AIDS diagnosis, Plaintiffs found that they could no longer conduct their lives or be "let alone" anywhere in Trumbull County. Soon after the disclosures alleged herein, Plaintiffs were forced to leave their home to seek safety and anonymity in another section of Ohio.

IX. COUNT SIX

(Pendent State Claim: Intentional Infliction of Emotional Distress)

93. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 92 of this Complaint.

94. Defendants Lockwood, Bennett, Dixon, Mannella and Wilson, both in their official capacities and in their individual capacities, intentionally, recklessly and maliciously made the disclosures alleged in this Complaint.

95. The disclosures by Defendants are especially outrageous because Defendants knew that information which would identify John Doe, his AIDS diagnosis and his sexual partners was confidential information protected from unauthorized disclosure under Ohio Revised Code Chapter 3701. However, Defendants knowingly committed a flagrant and willful violation of the confidentiality laws. This disclosure is absolutely intolerable in a civilized society which respects the right of individuals to protect themselves against the unauthorized disclosure of personal information by government officials.

96. Given the Plaintiffs' reasonable expectation of privacy, protected by the Federal and State Constitutions as well as the Ohio confidentiality statute, in the sensitive medical information concerning John Doe's AIDS diagnosis and sexual partners, the intentional disclosures by Defendants of that information caused extreme emotional distress to Plaintiffs. Any reasonable person would likewise be extremely distressed by the unauthorized disclosure of sensitive medical information.

97. The willful, malicious and outrageous disclosures by Defendants have caused Plaintiffs to suffer extreme mental anguish and humiliation. Plaintiff John Doe has contemplated committing suicide after the highly publicized revelations of his AIDS diagnosis. Plaintiff Jane Doe has shared in her fiance's anguish, and she has become extremely depressed since the Defendants made their public disclosures in early December, 1993. In addition, the emotional distress inflicted upon both Plaintiffs as a result of the unauthorized disclosures by Defendants have adversely affected the physical health and well-being of Plaintiffs.

X. COUNT SEVEN

(Pendent State Claim: Libelous Defamation)

98. Plaintiffs reallege and incorporate herein each and every allegation contained in paragraphs 1 through 97 of this Complaint.

99. In addition to disclosing John Doe's identity and AIDS diagnosis to Trumbull County newspapers, Defendant George Lockwood also told the local media that John Doe was deliberately infecting people with HIV. According to an account printed in the Tribune Chronicle: "'He has said he's trying to bring other people down with him and he's already infected two women and a baby," Warren Deputy Health Commissioner said Thursday.'" See A-3. Plaintiffs contend unequivocally that this allegation is false.

100. In addition to disclosing John Doe's identity and sexual contacts to Trumbull County newspapers, Defendant Richard Dixon echoed Defendant Lockwood's malicious allegations that John Doe was deliberately infecting others. In the words of the Tribune Chronicle: "Dixon said

he has heard rumors that the man is "out to get people", but said he did not know if that is true." In addition, according to the Tribune Chronicle: "[Dixon] said the man seems to have had several sexual partners, and said he is a threat to the public." See A-3.

101. Defendants Lockwood and Dixon, in their official capacity and in their individual capacity, made defamatory statements with knowledge that they were false, or with reckless disregard of their probable falsity.

102. In the alternative, Defendants Lockwood and Dixon, in their official capacity and in their individual capacity, made defamatory statements with negligent disregard of their probable falsity.

103. The defamatory statements by Defendants Lockwood and Dixon falsely and maliciously charge John Doe with the crime of assault.

104. The defamatory statements by Defendants Lockwood and Dixon were published repeatedly in The Vindicator and the Tribune Chronicle, local newspapers printed and distributed in the cities of Warren and Niles.

105. The defamatory statements by Defendants Lockwood and Dixon have subjected John Doe to public contempt, ridicule and humiliation. The public hysteria resulting from these publications -- hysteria borne of bigotry, fear and ignorance about the AIDS epidemic -- has forced the Plaintiffs to leave their Trumbull County home to seek safety and anonymity in another part of the state. As a result of these publications, Plaintiff John Doe is a marked man in Trumbull County, forever branded with a scarlet "A". See A-4.

106. As a direct and proximate result of the foregoing, Plaintiffs have suffered and will continue to suffer damages relating to their trauma, anxiety, humiliation, public scorn, loss of reputation and other injuries.

XI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand that judgment be entered against Defendants. Specifically, Plaintiffs demand damages as follows:

(a) An award of Ten Million Dollars ($10,000,000.00) compensatory damages for the violation of Plaintiffs' rights, including: constitutional rights to privacy, liberty and due process of law; and statutory rights protecting the confidentiality of John Doe's AIDS diagnosis;

(b) An award of Ten Million Dollars ($10,000,000.00) compensatory damages for the tortious invasion of privacy, infliction of emotional distress and libelous defamation suffered by Plaintiffs. This award should include a measure of the physical and emotional injuries suffered by Plaintiffs as a result of these torts, as well as a measure of actual out of pocket costs incurred by Plaintiffs as a result of these torts (such as the moving costs incurred);

(c) An award of Fifteen Million Dollars ($15,000,000.00) punitive damages for the violation of Plaintiffs' constitutional rights;

(d) An award of Fifteen Million Dollars ($15,000,000.00) punitive damages for the tortious invasion of privacy, infliction of emotional distress and libelous defamation suffered by Plaintiffs.

(e) An order by this Court enjoining Defendants from any disclosure of information relating to Plaintiffs' identities and AIDS diagnosis and other sensitive medical information.

(f) An order granting Plaintiffs such other relief, including costs and reasonable attorney fees, as the Court deems proper.

Respectfully submitted,

/S/

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Supreme Court, U.S.
FILED
OCT 25 1996
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(2)

No. 96-495

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JOHN DOE, *et al.*,
Petitioners,

v.

GEORGE LOCKWOOD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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17 pp

QUESTION PRESENTED

WHETHER AN INDIVIDUAL HAS A CONSTITUTIONALLY PROTECTED PRIVACY INTEREST IN PREVENTING THE PUBLIC DISCLOSURE OF INFORMATION REGARDING HIS HIV INFECTION WHEN SUCH INFORMATION PREVIOUSLY HAS BEEN DISCLOSED IN OPEN COURT PROCEEDINGS AND PUBLIC COURT RECORDS.

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---

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is unpublished. The memorandum opinion and order of the district court (Pet. App. 16a-34a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1996. This Court's jurisdiction is invoked by Petitioners John and Jane Doe pursuant to 28 U.S.C. § 1245(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners John and Jane Doe claim Respondents violated their rights under Amendment XIV, Section 1,

United States Constitution, and seek monetary damages pursuant to 42 U.S.C. § 1983. This constitutional provision and statute are set out verbatim at pages 1 and 2 of the Petition.

STATEMENT OF THE CASE

On March 18, 1994, petitioners John Doe and Jane Doe (collectively, "Petitioners") filed their Complaint in the United States District Court for the Northern District of Ohio alleging various federal and state causes of action against five individual and two corporate defendants, including respondent George Lockwood ("Lockwood"). Lockwood is the Deputy Health Commissioner for respondent Warren City Board of Health (the "Board").[1] At issue is the opinion and judgment of the United States Court of Appeals for the Sixth Circuit affirming the dismissal by the district court of Petitioners' Second Amended Complaint (the "Complaint").

Petitioners allege that, at some point in early fall of 1993, Lockwood had discussions with an employee of the Ohio Department of Health who had been involved in testing Petitioners for the human immunological virus ("HIV") associated with Acquired Immune Deficiency Syndrome ("AIDS"). In that discussion, the employee revealed to Lockwood that he had received a threat from John Doe to the effect that Doe intended "to intentionally infect unknowing female sexual partners" with HIV.

According to Petitioners, Lockwood thereafter sought to expose John Doe's identity and AIDS status. Lockwood purportedly disclosed John Doe's identity and AIDS diagnosis in the fall of 1993 to various law enforcement offi-

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[1] This brief is filed solely on behalf of Lockwood and the Board. The Board was added as a defendant in Petitioners' Second Amended Complaint. Leave to file that pleading was granted by the district court on the same date it issued its memorandum opinion and order granting Lockwood's motion to dismiss.

cials in Trumball County, Ohio, including the county's assistant prosecutor, the Niles, Ohio municipal prosecutor, and several members of the Niles police force. Petitioners allege that, in September 1993, these law enforcement officials already knew of John Doe's "AIDS diagnosis" through other means and that one, respondent Bruce Bennett, even had a copy of John Doe's AIDS test results in his files.

Petitioners further acknowledge that, by the time of Lockwood's alleged disclosures, John Doe had revealed his HIV positive status in an open proceeding in the Niles Municipal Court. Doe had been convicted on September 15, 1993, on a charge of receiving stolen property and had received a sentence of incarceration for six months. Two days later, he appeared before Judge Thomas Townley and requested that he be granted medical leave from this sentence for treatment of his HIV infection. The disclosure of his HIV positive status was journalized on the municipal court's criminal trial docket, a public record, as follows:

> Defendant appeared for review of his sentence and requested release for treatment for HIV positive. Defendant shall be transported to Dr. Crouch Family Practice Center in Warren, Ohio. . . .

Petitioners attached a copy of the trial docket to the Complaint as Exhibit A-9.

In early December 1993, Lockwood told two local newspapers that the State Health Department had alerted the Board regarding John Doe's threat to infect others and confirmed that the man who made the threat had lived in Niles and Warren, Ohio. While acknowledging that Lockwood never revealed John Doe's name to the media. Petitioners contend that he revealed "sufficient background information" regarding John Doe to disclose his identity. Yet, contrary to this conclusory allegation, the newspaper articles attached as exhibits to the Com-

plaint state that Lockwood did not divulge "even general characteristics such as race and age" which might lead others to identify John Doe.

Petitioners claim that Lockwood's alleged dissemination of information regarding John Doe, combined with disclosures by other individual respondents herein, "proximately caused the violation of [Petitioners'] rights to privacy . . . as secured by the Fourth and Fourteenth Amendments of the U.S. Constitution." Petitioners further assert that the Board pursued a *de facto* policy "to expose John Doe and his AIDS status" which "proximately caused the violation of [Petitioners'] constitutional rights to privacy . . ." and demonstrated "a deliberate indifference to the constitutional rights" of Petitioners by failing to train its agents (presumably Lockwood) regarding state statutory protections for HIV/AIDS information.

On the motions to dismiss of Lockwood and other respondents herein, the district court, in a Memorandum Opinion and Order filed January 27, 1995, held that Petitioners' "right to privacy allegations fail to state a claim upon which relief can be granted pursuant to 42 U.S.C. § 1983," finding that two federal appellate decisions, *J.P. v. DeSanti,* 653 F.2d 1080 (6th Cir. 1981), and *Doe v. Wigginton,* 21 F.3d 733 (6th Cir. 1994), were controlling and dispositive of Petitioners' constitutional privacy claims. It further ruled that, even if Petitioners were able to state an actionable substantive due process claim, the individual defendants, including Lockwood, would be entitled to qualified immunity from damage liability based on this precedent. Accordingly, it dismissed the Complaint.

That judgment was affirmed by the court of appeals based on its *de novo* review of the Complaint. Rather than rely on its prior decisions in *DeSanti* and *Wigginton,* the court assumed that the constitutional privacy right asserted by Petitioners existed, but found that the factual

allegations in the Complaint failed to state a claim for violation of that right due to the disclosure of John Doe's HIV positive status at the hearing before Judge Townley. As stated by the court:

> Under the facts as stated in the complaint, John Doe cannot claim that state actors who disseminate the same information to the public that he disclosed in open court have violated his asserted federal constitutional right to informational privacy. We believe this is true even if the state actors' source of the private information was not the court proceedings because the information is no longer "private" in the sense that the public is unaware of the information.

(Pet. App. at 12a.)

ARGUMENT

The court of appeals affirmed the dismissal of Petitioners' Complaint on narrow grounds. It held simply that the publication of John Doe's HIV positive status in open court and on the public record, acknowledged by Petitioners in their Complaint, extinguished as a matter of law any claim that such information could be deemed "private." Unable to cite to any authority which would suggest that this ruling is inconsistent with prior decisions of this Court or those of another court of appeals, Petitioners attempt to manufacture a conflict between the opinion rendered by the *district court* below and a series of decisions by other federal courts that have misinterpreted and misapplied this Court's holding in *Whalen v. Roe*, 429 U.S. 587, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). In essence, Petitioners ask the Court to issue a writ of certiorari and review the dismissal of the Complaint based not on the holding of the court of appeals in this case but decisions issued by that court in prior, unrelated cases. This bid to obtain what would be tantamount to an advisory opinion from the Court should be rejected and the petition denied.

1. ***The Decision On Appeal Below Is Consistent With Prior Decisions Of This Court And The Various Federal Courts Of Appeals.***

Petitioners do not address the finding of the court of appeals that information regarding John Doe's HIV positive status "entered the public domain at the hearing" on his request for medical leave before Municipal Judge Townley. Nor do they challenge the court's central holding that, as a result of this disclosure, Respondents "could not have breached any federal constitutional right in informational privacy Doe may [have] formerly had in this information by disseminating to the public information that was already public." (Pet. App. at 14a.) Petitioners' failure to contest these dispositive aspects of the decision below is understandable since "there is no question that an individual cannot expect to have a constitutionally protected privacy interest in matters of public record." *Doe v. City of New York*, 15 F.3d 264, 268 (2d Cir. 1994).[2] *See also Scheetz v. The Morning Call, Inc.*,

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[2] Petitioners note correctly that, in *City of New York*, the court of appeals found that the conciliation agreement revealing the plaintiff's HIV status was not a public record as a matter of law and did not become public until the defendant chose to make it so. *City of New York*, 15 F.3d at 269. However, Petitioners' attempt to analogize these facts to John Doe's disclosure of his HIV diagnosis before Judge Townley breaks down when it is recognized that neither Judge Townley nor the Niles Municipal Court was named as a defendant in this case. Contrary to Petitioners' allegations, Judge Townley is not, as a matter of law, an employee of respondent City of Niles. In *Foster v. Walsh*, 864 F.2d 416 (6th Cir. 1988), the court of appeals held that Ohio municipal courts were not "persons" within the meaning of 42 U.S.C. § 1983 since such courts are distinct from the municipal corporations in which they sit. As stated by the court:

> It cannot be seriously argued that an Ohio municipal court is indistinguishable from the municipal corporation in which it sits. The [municipal court] . . . is part of the Ohio state court system, established by the Ohio state legislature. Ohio Rev. Code § 1901.01. It is subject to the supervision of the Ohio Supreme Court. Ohio Const., Art. IV, § 5. The municipal

946 F.2d 202, 207 (3d Cir. 1991) (individual could not have reasonable expectation of privacy with respect to information reported to police and available in public record), *cert. denied*, 502 U.S. 1095 (1992).

This Court has long adhered to the principle that "[w]hat transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546 (1947). Accordingly, once truthful information is publicly revealed in the courtroom and placed in the public domain, further dissemination of that information cannot be constitutionally restrained by the State. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103, 99 S.Ct. 2667, 2671, 61 L.Ed.2d 399 (1979), citing *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977). In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), the Court held that damages could not be recovered against a television station based on the tort of invasion of privacy when the station had reported the name of a rape victim that had been revealed in court records, even where state law made publication of such information a crime. The Court noted that under prevailing common law no action for public disclosure of private information arises where that information is a matter of public record.

> There is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public. Thus there is no liability for giving publicity to facts about the plaintiff's life which are matters of public record. . . .

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court may not be abolished by the city council, nor may the council expand or restrict the court's jurisdiction. See *State ex rel. Cherrington v. Hutsinpiller*, 112 Ohio St. 468, 147 N.E. 647 (1925).

864 F.2d at 418-19. Even if one were to assume that Petitioners' unsupported legal conclusions regarding the actions of Judge Townley are correct, those actions cannot be imputed to respondent City of Niles.

Cox Broadcasting, 420 U.S. at 494, 95 S.Ct. at 1045, quoting Restatement (Second) of Torts § 652D, Comment *c* (Tent. Draft No. 13, Apr. 27, 1967).[a] Whether the name of the victim should have been revealed initially in court documents was immaterial in determining whether republication of that information was actionable. "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served." 420 U.S. at 495, 95 S.Ct. at 1046.

Simply put, Petitioners could no longer claim an interest in preventing the alleged disclosure of John Doe's HIV infection once that fact was spread upon the public record. Whether, as Petitioners allege, John Doe was "forced" by Judge Townley to reveal this information is irrelevant to the viability of Petitioners' privacy claims against Lockwood and the other respondents. By the time Lockwood is alleged to have disclosed publicly John Doe's HIV positive status in December 1993, that information, rightly or wrongly, had been a matter of public record for two and a half months and could not be regarded as private in any sense of the word.

At no point in their petition to this Court do Petitioners even attempt to explain how Lockwood and the Board could be held liable for disclosure of information that was already a matter of public record. Instead, they attack the court of appeals' purported failure to accept their unsupported allegation that John Doe was "forced" to reveal his HIV infection in open court by Judge Townley and find that such disclosure was not "voluntary, knowing and intelligent." (Petition at 19, 22.) This claim of error plainly does not offer a compelling basis for the Court to exercise its discretion and accept this case for review.

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[a] The quoted comment was incorporated into the final version of the Restatement at Comment b. See Restatement (Second) of Torts § 652D, Comment *b*, at 385 (1977).

Moreover, it is wrong. In their Complaint, Petitioners expressly allege that "John Doe requested medical leave from the [Municipal] Court for treatment of his blood disorder . . . ." (Pet. App. at 63a, ¶ 25.) As the court of appeals noted, there is not a single factual allegation in the Complaint suggesting "that Doe's request for medical leave was other than a voluntary choice on his part." (Pet. App. at 13a.) Having made that request, Doe could not have reasonably expected that the municipal court would not require him to disclose the nature of the medical condition for which he desired to obtain treatment, particularly when he had just been sentenced two days earlier. Knowing that he was in open court, Doe chose to divulge his HIV condition in return for relief from his sentence.

To assert that Doe was "forced" to reveal his HIV positive status under the circumstances alleged is therefore meaningless and can only be regarded as an unwarranted factual inference which the court was free to disregard in determining whether Doe's disclosure of his condition was knowing and voluntary. *See Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987) (on motion to dismiss for failure to state a claim, court must accept as true well-pleaded facts but need not accept as true legal conclusions or unwarranted factual inferences); *Blackburn v. Fisk University*, 443 F.2d 121, 123 (6th Cir. 1971) (court considering motion to dismiss is not bound by allegations that are clearly unsupported and unsupportable). Looking solely at the *facts* alleged in the Complaint, the court of appeals concluded that "Doe has not made a threshold showing that he was given no other choice by the state than to reveal" his HIV positive status. (Pet. App. at 14a.) In light of the public nature of that disclosure and its journalization on the official records of the municipal court, Doe's HIV diagnosis became a matter of public knowledge as a matter of law, thereby extinguishing any claim Petitioners might have been able to assert based on their allegations of subsequent dissemination of that information by Respondents.

2. *Decisions Issued By The Court Of Appeals In Prior, Unrelated Cases Do Not Offer A Basis For Granting The Petition.*

Petitioners devote the bulk of their petition to a discussion of two prior opinions of the Court of Appeals for the Sixth Circuit—*Jarvis v. Wellman*, 52 F.3d 125 (6th Cir. 1995), and *Doe v. Wigginton*, 21 F.3d 733 (6th Cir. 1994)—and how those opinions purportedly conflict with this Court's decision in *Whalen v. Roe*, 429 U.S. 587, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). Petitioners suggest that the Court should accept *this* case for review to "correct" the "Sixth Circuit's hostility to *Whalen's* formulation of informational privacy." (Petition at 15.) The difficulty with this argument is obvious. The court of appeals did not rely on either *Wigginton* or *Jarvis* in affirming the dismissal of the Complaint.

Indeed, the court of appeals assumed without analysis that the constitutional right to informational privacy claimed by Petitioners existed *despite* the holdings in *Wigginton* and *Jarvis* to the contrary. It focused instead on whether the factual allegations in the Complaint "show that the defendants violated John Doe's right to informational privacy under the Constitution of the United States . . . ." (Pet. App. at 11a.) It found those allegations insufficient because of Doe's prior public disclosure of his medical condition. (Pet. App. at 12a.) Nothing in the court of appeals' opinion indicates that it adopted the reasoning or precedent employed by the district court. Rather, it affirmed the district court's decision because it found that, based on its *de novo* review of the Complaint, Petitioners had failed to state a federal claim upon which relief can be granted.

The opinion issued by the court of appeals in this case bears no resemblance to the decisions rendered in *Wigginton* and *Jarvis*. The holdings in those prior cases are unquestionably at odds with decisions issued by other federal appellate courts. They have absolutely nothing to

do, however, with the decision rendered by the court of appeals in *this* case. Petitioners' attempt to suggest otherwise borders on the disingenuous. Petitioners not only seek to mislead the Court as to the nature and content of the decision below, they also misstate the meaning and import of this Court's decisions in area of "informational privacy."

Specifically, this case does not, as Petitioners argue, implicate the constitutional privacy interest addressed by this Court in *Whalen*. It was the individual's right to avoid disclosure of otherwise private information *to* the government—specifically the reporting to New York state officials of the names and addresses of individuals who were prescribed certain drugs—which was at issue in that case. *Whalen*, 429 U.S. at 591, 97 S.Ct. at 872. Noting that the disclosures required under the state statute were not "meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care", 429 U.S. at 602, 97 S.Ct. at 878, this Court held that the required reporting of such information did not "constitute an invasion of any right or liberty protected by the Fourteenth Amendment." 429 U.S. at 603-604, 97 S. Ct. at 878.

What was not at issue and was not decided in *Whalen* was whether the public dissemination of such information *by* New York officials would implicate constitutional protections. Indeed, the Court explicitly stated that it was not deciding whether disclosure of the information by state officials would violate any constitutional guarantee. *Whalen*, 429 U.S. at 605-606, 97 S.Ct. at 879. To assure that there would be no misunderstanding on this point, Justice Stewart wrote separately to note that the Court's opinion did not support the proposition that dissemination of the information collected by New York would violate the Constitution. 429 U.S. at 607-609, 97 S.Ct. at 880-81.

Thus, there is no basis for Petitioners' apparent contention that *Whalen* constitutes controlling precedent with

respect to disclosures *by* governmental officials of personal information. This is not to say that *Whalen* has no precedential value. In fact, the Court of Appeals for the Sixth Circuit has repeatedly applied and followed *Whalen* in cases where the claimed violation of a constitutional right arose from a governmental *demand* for medical information. *See, e.g., Gutierrez v. Lynch*, 826 F.2d 1534 (6th Cir. 1987) (municipal ordinance requiring employees on sick leave for more than 30 days to complete medical information form); *In re Zuniga*, 714 F.2d 632 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983) (grand jury subpoena of psychotherapist records); *General Motors Corp. v. Director, National Institute of Occupational Safety and Health*, 636 F.2d 16 3(6th Cir. 1980), *cert. denied*, 454 U.S. 877 (1981) (N.I.O.S.H. request for employe medical records). *Whalen* cannot, however, be construed as establishing a constitutional right to prevent the disclosure of medical information by governmental officials, the right asserted by Petitioners in this case. (See Pet. App. at 75a, ¶ 75.)

The privacy interest actually acknowledged in *Whalen* bears little resemblance to the broad and ill-defined right asserted by Petitioners. The constitutional leap proposed by Petitioners—from an individual interest in avoiding governmental intrusion into personal matters to an implied affirmative obligation on the part of government to keep confidential the information it collects—simply does not stand up to scrutiny. Whatever interest Petitioners may have had under *Whalen* in avoiding disclosure of John Doe's HIV/AIDS status to the State—a right they do not allege was violated by Lockwood, the Board or any of the other respondents—that interest cannot be transmuted into a constitutional guarantee of confidentialiy wih respect to such information. No decision of this Court supports such an expansive reading of the Fourteenth Amendment. *See Paul v. Davis*, 424 U.S. 693, 713, 96

S.Ct. 1155, 1166, 47 L.Ed.2d 405 (1976) (asserted right to prevent publication of arrest was "far afield from privacy rights previously recognized by the Court).

CONCLUSION

For the reasons and the authorities cited herein, Respondents George Lockwood and Warren City Board of Health respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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